EXHIBIT B

OPUS 2
INTERNATIONAL

BSG Resources Limited (In Administration) v (1) Vale S.A. (2) Filip De Ly (3) David A.R. Williams (3) Michael Hwang

Day 1

September 4, 2019

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Wednesday, 4 September 2019

(10.30 am)

Application by MR FOXTON

MRS JUSTICE MOULDER: Yes, Mr Foxton.

MR FOXTON: My Lady, good morning. As you know I appear with Mr Willan for Vale. My learned friends, Mr Gruder QC and Mr Quirk, appear for BSGR and Mr Hooker of Boies Schiller appears for Sir David Williams and Dr Michael Hwang, two of the arbitrators.

MRS JUSTICE MOULDER: Right.

MR FOXTON: My Lady, there is a preliminary point of debate between the parties as to whether this hearing should take place in public or in private.

MRS JUSTICE MOULDER: Yes.

MR FOXTON: And we're currently in private pending a determination of that question.

MRS JUSTICE MOULDER: Yes.

MR FOXTON: My Lady, my clients' position is the hearing should be in public. The principal reason for that is the award and indeed BSGR grounds of challenge are all already in the public domain, because, as a result of US enforcement proceedings, the material can be accessed from the US court e-filing system. For what it is worth, the award has also been published by Global Arbitration Review on 25 April with a link to it

in an article by Sebastian Perry, headlined, "Award in Guinea bribery dispute made public". Therefore, as it were, the horse has left the stable in any event.

In addition to that overwhelming practical argument, the court has a discretion. We accept that the challenge to the award would presumptively be in private but with the court having a discretion to hear it in public. But we say the opposite is true of the enforcement action in which Mr Gruder's clients bring an application. So we have a position where the court as it were could start --

MRS JUSTICE MOULDER: I think Lord Mance described it as a starting point rather than a presumption in Bankers Trust v Moscow, so I think public is a starting point. That includes arbitration, that is what he was dealing with.

MR FOXTON: My Lady, one can see that in a dispute that remained entirely confidential, it might be a pretty significant starting point but we say in one where the terms of the award are already in the public domain, plainly it cannot be. So, my Lady, for those reasons we ask for an order it be in public.

MRS JUSTICE MOULDER: Yes. Thank you.

Submissions by MR GRUDER

MR GRUDER: My Lady, it's necessary to go to the rules which

one finds at CPR 62.10 at 706. What that says is the court may order an arbitration claim be heard either in public or in private. Rule 39.2 does not apply:

"Subject to any order made under paragraph 1, the determination of a preliminary point of law [which does not apply here] or an appeal under section 69 will be heard in public and all other arbitration claims will be heard in private."

So the starting point is that the section 68 which will come on in November will be heard in private, subject to the court's power under CPR 62.10(1). Again, the starting point, and the presumption, is that the security for the claim application under section 70(70) or the security for costs application again should be heard in private.

The other side contend that the enforcement proceedings -- enforcement part of this hearing, our application to set aside or to stay the order of Mr Justice Bryan presumptively should be heard in public but in our respectful submission that is a misreading of the rules, because what one has to look at is Part 3, which one finds at page 711, which deals with enforcement, 62.17:

"Section ... applies to all arbitration enforcement proceedings other than a claim on the award.

"An application for permission under section 66 to enforce an award in the same manner as a judgment or an order may be made without notice in an arbitration claim form."

That has already happened and the order has been granted. But 3 is important:

"The parties upon whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under section 1 of this Part."

So our application to set aside or stay Mr Justice Bryan's order is continuing today as if it were an arbitration claim under section 1 of this Part.

If on that basis one then goes back to 62.10, and one goes to 62.10(3)(b):

"All other arbitration claims will be heard in private."

So we say that the presumption is that all the applications today should be heard in private and we would submit that is the right position.

The fact that details have leaked out, whether by way of US court proceedings or by way of the Global Arbitration Review, should not mean that this court should subvert the confidentiality of the arbitration award and the grounds of our application

more than it has been subverted already.

There is a reporter waiting outside. He approached us. And if my Lady says that this is in public, then potentially everything we say today will be able to be reported in the press, and in my respectful submission that would be wrong and contrary to the position, both under the rules and the authorities, that the presumption is that arbitration hearings and applications relating thereto should be in private.

In my respectful submission, supposing I'm wrong on my construction of CPR 62, then in my submission the -- and my learned friend is right, then the enforcement part of today's hearing would be potentially in public, but that would, in my submission, subvert the other parts of this hearing which unequivocally, and I don't think it's denied, should be in private.

So in my respectful submission, the whole of today's hearing should be in private.

Submissions by MR FOXTON

MR FOXTON: My Lady, very briefly, details have not leaked. They have come into the public domain as a result of the proper application of US court procedure where proceedings have been commenced. So far as enforcement is concerned, we do say that Mr Gruder has misunderstood the effect of the section on enforcement that he was

quoting from page 711 of volume 2, which is dealing with the time limits in case management steps.

On his argument it would appear to be that an enforcement action will be public if no acknowledgement of service is filed and then becomes one that should be private as a matter of a starting point if one is. That simply isn't what that rule is about. But the overwhelming point, my lady, is that the matter is in the public domain not as a result of any improper behaviour or breach of confidence but as the result of the application of US procedural law.

Submissions by MR HOOKER

MR HOOKER: My Lady, I find myself in the curious position of endorsing many of Mr Gruder's submissions. In my submission today's proceedings should be in private and I only add that of course my clients, who are the arbitrators are parties only to the action to set aside the award, they're not parties to the action on enforcement. But for the reasons that have been set out in my submission the strong presumption in favour of the set aside being in private should be maintained.

MRS JUSTICE MOULDER: Sorry, you just referred to submissions. Have you put -- I'm afraid, if you've put in a skeleton I haven't received one.

MR HOOKER: No, I haven't.

MRS JUSTICE MOULDER: I'm sorry, I just wanted to double-check because it does happen that skeletons don't make their way to me. All right. Thank you.

Judgment removed for approval

MR FOXTON: My Lady, I am obliged. I think the sign may need to come off the door. I think the gentleman who appeared was in fact a law reporter who may well come back towards the day in any event but nonetheless it should reflect the order that your Ladyship has just made.

MRS JUSTICE MOULDER: Could you make the change, please? Thank you. Yes.

Submissions by MR FOXTON

MR FOXTON: My Lady, there are three applications today, there are my clients' applications for conditions on BSGR's pursuit of its section 68 application. There's BSGR's application to set aside Mr Justice Bryan's order giving permission to enforce and then there is, if time permits, BSGR's application for permission to amend its section 68 application. I think Mr Hooker in particular wants to be heard on that amendment application.

My Lady, what I was proposing and I discussed this with Mr Gruder, is that I would open Vale's applications, I would then let Mr Gruder open his own applications while responding to my application and then

I would reply on mine, respond to his and he would get a last word on his own applications at the end.

MRS JUSTICE MOULDER: All right.

MR FOXTON: Now, on that basis I was going to briefly take the court the underlying arbitration and award, then look at the principles relevant to the court's discretion to impose conditions under section 77, and then within that framework look at two points. Briefly, the flimsy nature of BSGR's challenge and, second, why we say that there is a real risk of prejudice to Vale in relation to enforcement and recovery as a result of the challenge that BSGR has brought to the award.

Then finally on security for costs the issue is purely one of quantum. I'm going to be very brief on that when we come to it.

Now, so far as the background is concerned, I think the court will have seen from the skeletons that BSGR had been granted certain concessions by the Government of Guinea, and in 2010 my clients entered into a joint venture agreement and shareholders' agreement with BSGR to exploit those concessions. In April 2014 the Government of Guinea revoked BSGR's concessions after having determined that BSGR had obtained them by bribery. Obviously that rendered the concessions worthless and Vale commenced an LCIA arbitration against

BSGR in April 2014.

It is fair to say that the course of that arbitration did not run smoothly. When the parties were before Mr Justice Popplewell in 2017, I described BSGR's strategy as being one of guerrilla arbitration tactics and returning to the dispute two years on that description remains entirely accurate. Now, the procedural history is summarised in a section at the beginning of the award in bundle 4, tab 16, beginning on page 24.

My Lady, taking the matter I hope relatively efficiently, one sees from paragraph 29 that in October 2014 BSGR filed the first of what were three applications in the event to seek to stay the first -- the LCIA arbitration. The first of those stay applications seeking an order pending the outcome of a separate arbitration, an ICSID arbitration, an investment treaty arbitration between BSGR and the Republic of Guinea. That application was rejected by the tribunal essentially because it was too early, as one can see from paragraph 30, to know how the ICSID dispute would develop.

Notwithstanding that, the stay application was renewed some five months later by BSGR on 20 May 2015. One sees that from paragraph 36 at the bottom of page 25

and that application was refused because the tribunal said there had been no material change of circumstances since they had previously ruled on the same issue five months before.

Now, the tribunal did order, effectively by consent, subject to one exception -- and this is in paragraph 37 -- that there would be record-sharing between the two arbitrations so that documents and productions in one, in the LCIA arbitration, would be available for BSGR in the ICSID arbitration and similarly material that BSGR got in the ICSID arbitration would be made available in the LCIA arbitration, subject to certain matters where BSGR said that there was separate issues of confidentiality that arose. But that was effectively ordered with the consent of the parties.

Now, what then happens, if one goes on to paragraph 66 on page 30, is that BSGR brought challenges to remove all three arbitrators on five grounds. That challenge was brought on 5 May 2016, less than three months before the merits hearing was due to start at the end of August 2016. And challenges were initially brought to the LCIA court and if one jumps ahead, but perhaps keeping a finger in page 30, to paragraph 82 on page 33, one of those challenges succeeded. This was

a challenge to the appointment of His Honour Judge Charles Brower as chairman based upon remarks he had made about the arbitration at a conference. None of the other challenges succeeded and in particular none of the challenges to Dr Michael Hwang and Sir David Williams succeeded.

So whilst BSGR make much of the fact that they can't be said to be completely frivolous because one of their challenges has been upheld, it is important to note the wholesale rejection of the other grounds.

The removal of His Honour Judge Charles Brower obviously led to the requirement that a new chairman of the arbitration be appointed. BSGR raised complaints about how the tribunal went about that, which at one stage formed one of the grounds of the section 68 but as that challenge is no longer pursued I don't say anything more about it.

In the event the chairman was appointed by the LCIA court and it was Professor Dr De Ly, and one can see that, if necessary, from paragraph 96 on page 35.

Now, my Lady, what then happened at paragraph 100 on the same page is BSGR then brought a second challenge to Dr Hwang and to the other arbitrators and brought a yet further stay application pending the outcome of that challenge.

The LCIA court heard and rejected that challenge. Their ruling is at paragraph 120 on page 39. Now, I mentioned to my Lady a moment ago that the merits hearing had been fixed for the end of August and beginning of September 2016. In the event, what the tribunal did was cancel the evidentiary hearing -- this is paragraph 101 on page 36 -- but held what was to be an educational hearing, the purpose of which would be to bring the members of the tribunal up to speed with the materials and the dispute and also to resolve various outstanding procedural issues.

But BSGR wrote to the tribunal on 25 August saying that they would not participate in the educatory hearing and they would not provide written submissions, including written submissions on whether the tribunal should adopt decisions made by the previous constitution of the tribunal at the stage when His Honour Judge Charles Brower was the chair.

Now, the challenge that had been brought to Sir David Williams and Dr Michael Hwang came before the Commercial Court because it was renewed by BSGR, and it was heard by Mr Justice Popplewell and was wholly unsuccessful. And I do want briefly just to show your Ladyship what Mr Justice Popplewell, and indeed Lord Justice Christopher Clarke said about the challenge

in the context of reviewing it and for that one needs to go to bundle 1, tab 7.

Now, the cost ruling by Popplewell J is at bundle 1, tab 7, page 7, and he noted at paragraph 3 that the challenges were totally without merit, that the decision of the LCIA court should have put an end to the matter. He noted at paragraph 6, for example, that there was simply no evidence of substantial injustice. And paragraph 7 is interesting because there is, I'm afraid, an element of déjà vu for those of who participated in that hearing when it comes to the present one, when Mr Justice Popplewell noted:

"Serious allegations which had only been made after careful consideration and should have been formulated with precision were advanced, but the application was conducted in an entirely inappropriate manner, with the allegations shifting on a regular basis and there were aspects of Mr Dale's witness statement [he was the partner at Mishcon de Reya with the conduct of the case] which mischaracterised the nature of some of the underlying proceedings in a way which was seriously misleading. For example, characterising the record-sharing decision as an unprecedented decision when it was, in its relevant parts, a consent order."

And at paragraph 9 he noted that:

"The court should mark its disapproval of the conduct by ordering costs on an indemnity basis."

My Lady will know that those costs were never paid because BSGR claim that they regarded themselves as having been the victims of an injustice by the order made against them and decided the appropriate response to that was not to comply with it.

Permission to appeal was sought and refused by -- refused by Lord Justice Christopher Clarke, page 9 of the same tab, who certified the application as totally without merit, as one sees at the top. And Lord Justice Christopher Clarke I think fully understanding the game that was being played noted at the bottom of page 10 that:

"The grant of permission might involve, as may be intended, wholly undesirable disruption of the arbitration process."

Now, my Lady, reverting back to the award, the tribunal did confirm the decisions of the previous tribunal, that was paragraph 113 on page 38. What then happened was there was a dispute about when the evidentiary hearing should take place. I'm going to deal with that very briefly, because that is no longer pursued as a live ground. BSGR said it should be fixed for June 2017 because of Mr Wolfson, their desired

counsel's availability. The tribunal reserved dates, as one sees from paragraph 115, in February and April 2017 for the hearing. That was once said to be evidence of apparent bias, but that is no longer pursued.

It is worth noting in passing paragraph 118 and 119, that BSGR also brought a challenge to the tribunal hearing the ICSID dispute, a completely different tribunal. That must be, I think, its third challenge to tribunals in this matter but that challenge was also rejected.

Then moving on to para 130 on page 40, it announced that it would not be participating in the merits hearing. So that hearing went ahead without BSGR being present, albeit regular correspondence was put in by BSGR to the tribunal in the course of the hearing.

If one goes to para 139, your Ladyship will see various witnesses gave evidence and the first three of those, Souaré, Condé and Nabé, are the three witnesses who were later the subject of BSGR's attempt, after the merits hearing had ended, to adduce evidence of the transcripts of their evidence in the ICSID arbitration.

Now, moving forward to para 147, page 43, after the tribunal had closed the record -- and my Lady will know that that is a standard feature of international arbitration in order to bring some finality and mark the

stage when one moves from the process of evidence to the process of deliberation -- they made the standard order that said no further submissions either without the other side's consent or permission of the tribunal.

And at para 147 there were various applications. Vale applied to put in exhibits relating to the recent criminal conviction of a former Minister of Mines, Mr Thiam. That was consented to by BSGR, as one sees from para 149. BSGR agreed to Vale's request to amend the submission on costs and to submit three exhibits from the Thiam trial. BSGR also requested to put in material relating to Mr Thiam but in addition transcripts from the ICSID hearing and a forensic expert report which had yet to be produced in the ICSID hearing but which it intended to produce in due course.

Now, Vale did not object to the exhibits from Mr Thiam's trial going in. So both sides, by consent and with the consent of the other, put in material relating to Mr Thiam, but Vale did object to the attempt to put in evidence of transcripts from the ICSID arbitration and indeed later to an attempt to put in the closing brief filed by BSGR in the ICSID arbitration.

What the tribunal did, at para 152, is say that they would consider that application, they stayed their consideration of it pending their deliberations and

preparation of the award. Somewhat similar to the process one sometimes sees where applications for fresh evidence in the Court of Appeal are not actually ruled upon, save as part of the final judgment, allowing a tribunal to consider all of the evidence, including the attempt to introduce the fresh evidence, together and form a view as to its significance and what effect it might have.

Now, Mr Gruder in his skeleton tries to say there is a contrast between the tribunal allowing Vale's application to adduce evidence from Mr Thiam's trial and its ultimate refusal to allow BSGR to adduce transcripts of the ICSID evidence. But, with respect to my learned friend, that is a false point in many respects. First, because BSGR consented to Vale's application the tribunal did not need to rule on it at all because the terms of the order closing the proceedings, as one sees from para 166, on page 47, allowed either party to put in further material with the consent of the other party.

So that, I'm afraid, is a non-point.

In any event, each party was allowed, with the consent of the other, to put in Thiam-related material.

Third, because there is just a fundamental difference between putting in material from a criminal trial in which neither of the parties were involved,

an attempt by one party to put in transcripts of cross-examination from a different arbitration to which Vale were not a party before a different tribunal when it had had the chance to cross-examine three of those witnesses in the LCIA arbitration and had refused to avail itself of that opportunity.

Now, in the event, the tribunal decided not to allow that application to admit the additional material.

They were placed, by BSGR's guerrilla tactics, I'm afraid in a very difficult position, but they dealt with the matter professionally and fairly throughout. And one gets a sense of the position they found themselves in from concluding comments at paras 162 and 163 on page 46, which I would invite your Ladyship to cast an eye through. (Pause).

MRS JUSTICE MOULDER: Yes.

MR FOXTON: My Lady may feel that is a very measured and professional response to what had been an undoubtedly ongoing attempt to harass the tribunal and make its life as difficult as possible.

Now, the tribunal's conclusions for not admitting the material are set out at paras 167 to 169, and once again I would invite my Lady to read through those paragraphs. They begin on page 47. (Pause).

MRS JUSTICE MOULDER: Yes, I read it yesterday but I've

reread this morning.

MR FOXTON: My Lady, I'm grateful. Now, we make two points in relation to that. First of all, that is, we say, on its face a very clear, fair and wholly rational exercise of an undoubted procedural discretion, and with respect, we find it almost impossible to envisage any court or tribunal having reached the contrary conclusion.

But, second, at paragraph 169 the tribunal are absolutely clear that this material would not have affected the overall outcome of the arbitration, because it found multiple misrepresentations by BSGR other than those that depended upon proof of actual corruption.

So even absent a finding of corruption, the tribunal said they would have reached the same conclusion that the contract could be set aside and rescinded for fraudulent misrepresentation by reason of other misrepresentations made fraudulently by BSGR that did not depend upon proof of corruption by BSGR.

Now, Mr Gruder and Mr Quirk understandably seek to say whether there had been actual corruption, in particular in relation to Mamadie Touré, was a critical and fundamental issue in the arbitration and therefore if this material is relevant to that it opens the whole thing up. But with respect to them, it is simply impossible for them to go behind the very clear

statement of the tribunal to the contrary, and I'm not going to track through at any length, but if one goes, for example, to para 676, on page 186, my Lady will see that there were ten findings of fraudulent misrepresentations by BSGR, only the tenth of which is concerned with whether BSGR had actually engaged in bribery or corruption in relation to benefits granted to Madame Touré.

So absolutely clear that this material would not have changed the outcome of the arbitration and the tribunal is not only better placed to make that decision than anyone else, but that is the tribunal's role to decide. It is for the tribunal to review the material in the context of the rest of the evidence and reach a view on the significance of this material.

Now, my Lady with that run-up I then turn to the principles that govern the exercise of the court's power to impose conditions under section 70(7) and I don't think those are substantially in dispute, not least because I think Mr Quirk and I had an outing relatively recently before Mr Justice Picken in a case called Progas on very similar points and I think we're both content to take the statement of the applicable principles from there.

It is common ground, I think, that in contrast to

a party who attempts to impose condition on a challenge on jurisdictional grounds under section 67, for challenges under section 68 the party seeking the imposition of a condition does not need to show the challenge is flimsy, but we do say that here it is flimsy and that is a matter that is relevant to and informs the court's discretion.

Second, we accept on the basis of the current authorities that the general principle is the court will only order a condition of payment in of part of the award when there is a risk established of prejudice to the ability to enforce or recover under the award as a result of the section 68 challenge.

MRS JUSTICE MOULDER: Sorry, I know there's a transcript being taken but can you just run that by me again.

I note you say it was common ground, I have to say there were parts of the skeletons where I wasn't clear that there was common ground between you, so perhaps you had better just tell me again what you say the general principle is.

MR FOXTON: My Lady, before your Ladyship, because I think there is an issue as to -- all the cases are first instance cases I think on this point. Before your Ladyship we accept that the general principle is that a condition of payment of part of the award into court

will only be made if it can be shown that the bringing of the challenge creates a risk of prejudice in enforcing or recovering under the award. It is not meant to be a mechanism for making enforcement easier than it would have been if there had been no section 68 challenge.

MRS JUSTICE MOULDER: Right. So that's not quite the same, is it, as perhaps how I read the authority? So your -- I mean, Mr Justice Picken -- it might be worth looking at Mr Justice Picken in Progas because he cites Sir Jeremy Cooke in Erdenet, and I think it is referred to in one of the skeletons.

MR FOXTON: My Lady, I was going to go to Progas next.

MRS JUSTICE MOULDER: All right, that's fine. But as I say it seems to me it is very important that we understand what risk or prejudice we're talking about. I mean, you've just said it creates a risk of prejudice, whereas Sir Jeremy Cooke, the quotation is:

"If the existence of the challenge prejudices the ability to enforce or diminishes ability to honour the award."

Now, we may be dancing on the head of a pin because I don't know where I'm going to come out, but it does seem to me there's a difference between a risk of prejudice and actual prejudice.

MR FOXTON: Save to this, that he says a risk of dissipation is prejudice.

MRS JUSTICE MOULDER: Well, yes. As I say, it may come down to the same thing but I think it is quite important that I know what test you think I'm applying.

MR FOXTON: Certainly my Lady. Progas is at tab 40 of the authorities bundle and I think, as my Lady has probably seen, Mr Justice Picken quotes fairly extensively from Mr Justice Flaux and indeed from Sir Jeremy Cooke, so I was going to use Progas as a sort of portmanteau way of picking up the position as it appears from more than one authority.

MRS JUSTICE MOULDER: Is there some reason -- I seem to have two versions of almost every case, is there a reason why Progas appears twice at 40 and 41?

MR FOXTON: There isn't a good reason, my Lady. I think what has happened is that the parties had used different forms of case citation in their respective skeletons when citing the same authority, and I'm afraid those who prepared the bundle -- and in a sense this lies at my door of those here today -- thought they were separate cases when in fact they were the same case.

MRS JUSTICE MOULDER: All right. So I'm not looking for any nuances in the headnotes?

MR FOXTON: No.

That does at least have the benefit that the authorities bundle may be slightly less foreboding than it first appeared.

So I was going to go to the Lloyd's report if my learned friends are comfortable with that, which is at tab 40.

MRS JUSTICE MOULDER: Right.

MR FOXTON: Now, in his summary of the authorities, Mr Justice Picken first of all went to Mr Justice Flaux in A v B, and he sets out fairly extensive quotations from that judgment at para 52 of the judgment in Progas.

MRS JUSTICE MOULDER: Yes.

MR FOXTON: I don't know whether your Ladyship has had a chance to read through 47 to 50 internally, as it were, within para 52, the three quotations from A v B, for me just to pick up various points once you've had a chance to look at that. (Pause).

MRS JUSTICE MOULDER: Yes.

MR FOXTON: In para 47 we pick up the emphasis on risk of dissipation. The quote from Lord Saville in the DAC report, the risk of the ability of the losing party to honour -- the risk that the ability of the losing party to honour the award made by design or otherwise be diminished, and then risk of dissipation in 50 as well. There Mr Justice Flaux also noted:

"... not advisable to lay down hard and fast rules."

But the general principle, and we don't object to this:

"The court should not order security unless the applicant can demonstrate the challenge will prejudice its ability to enforce the award."

Now, my Lady, the reason that I talk about the loss of opportunity or the existence of a risk might itself be treated as a form of prejudice and in relation to risk of dissipation, that's plainly how the court treats it. It's not saying that it's not enough to show a risk of dissipation, you must show actual dissipation will on the balance of probability or inevitably occur.

We say that similarly if there are other events that may diminish, in Lord Saville's words, enforcement of the award, once again we're concerned with establishing a risk of such prejudice, not least because the court is looking at a position prospectively where the usual approach, be it security for costs or freezing orders or anything else, is assessment of risk rather than retrospectively, where the court is concerned with findings on the balance of probabilities of actual facts.

So it is certainly the case that I have applied the word "risk" to prejudice. That becomes a debate without

a difference if the creation of a risk of diminishing or dissipating is treated as itself prejudice, but I do think it is important to note that the court is not requiring proof on the balance of probability that something will happen which would not otherwise happen. The court is concerned with the existence of a sufficient risk of dissipation of a kind that would justify a court acting prospectively in, for example, a freezing order context.

So, my Lady, that's what we say about the terminological debate.

MRS JUSTICE MOULDER: Yes, although I think one has to go on and read what is then said in 53, where Mr Justice Picken quotes Mr Justice Teare in X v Y, because I think there are two points there. I mean, firstly Mr Justice Teare makes the point that:

"Section 70 should not be used as a means of assisting a party to enforce an award."

Then he goes on and says:

"An order can only be justified if the existence of the challenges in some way prejudices the ability to enforce the award or diminishes the ability to honour the award."

Now, I think you're saying the same thing because I think you're saying other events which may diminish

enforcement.

MR FOXTON: My Lady, certainly it must be, my Lady, the existence of the 67 and 68 that creates the risk that would not exist absent those 67s and 68s. My, I hope care in using the terminology is simply to draw that distinction between when a court identifies a risk of something happening as against when the court makes findings on the balance of probability that it has happened or will happen. I don't at all cavil with the need for the link between the risk and the challenges, but it is the risk that is the thing, as it were.

MRS JUSTICE MOULDER: Yes.

MR FOXTON: My Lady, there's then also quotations from Sir Jeremy Cooke in Erdenet and once again the judge quotes, I think at para 54, and then there is a summary of the facts in Erdenet at paragraph 58 and paragraph 59. We are more than content with that formulation. We say once again the focus is on risk of dissipation, risk of diminishing the ability to pay resulting from the existence of the section -- in our case section 68 -- challenge.

It's quite interesting, looking at the facts of Erdenet as summarised in paragraph 58, indeed, as to why Sir Jeremy felt that the order was appropriate:

"The lack of any evidence of the claimant's

financial position or evidence to show security would stifle the lack of a realistic prospect of enforcement until the challenges have been resolved ... no assets in the UK ... accounting irregularities characterised as financial delinquency -..."

And coming on to para 61, quoted by Mr Justice Picken at 59, the fact that a 49% in a shareholding in a company had been transferred, and looking at the last --

MRS JUSTICE MOULDER: Yes, I think you're going to get limited assistance from the facts because I think if we go into the facts of Erdenet the timing of what was at issue there is very different from the timing here. So --

MR FOXTON: No, well --

MRS JUSTICE MOULDER: -- I'm not sure it is helpful to pick out those factors unless you want to take me through the facts of Erdenet because my recollection, reading it yesterday, was that the timing, as I say, is rather different.

MR FOXTON: There is different timing. I took your Ladyship to them in part because I wouldn't want to it be said that I had glossed over those timing differences in the course of taking your Ladyship to the case. But your Ladyship is plainly fully alive to those differences and

therefore I can rest assured on that aspect.

Now, my Lady, what those cases don't say anything specific about is what significance one attaches, in this context, to a section 68 challenge that is flimsy in its nature. We do say that that is a matter that is relevant. It's relevant because section 70(7) ultimately remains a discretionary provision, but also because if a party that seeks to bring and pursue an obviously weak and flimsy challenge with a low prospect of success inevitably raises the issue: well, what is your purpose in doing that? Now, I don't say that that on its own is sufficient to raise an inference that the purpose of bringing the challenge is to buy time to make enforcement more difficult, but it is certainly a matter which in conjunction with other material we say can support that conclusion.

My Lady, thirdly, because it can be seen here as part of a persistent course of conduct going right back to the start of the arbitration in which it is clear BSGR is doing everything it can to prevent Vale obtaining relief for the wrong it has suffered.

MRS JUSTICE MOULDER: Well, we're obviously going to come on to that but no doubt it's going to be said that life is a very different now because the company is in administration.

MR FOXTON: That is and will be said and, my Lady, alas the reality on the ground is not anything like as different as the formality of putting the company into administration might suggest.

So, my Lady, I was then going to turn -- I deal very briefly with this with the merits of the challenge. We've got those in bundle 3 at tab 11, I think beginning at page 6. My Lady, we have the fact that of the four matters in that paragraph 7 initially relied upon --

MRS JUSTICE MOULDER: Sorry, I missed the cross reference. I was just thinking about a point and got distracted.

MR FOXTON: Yes, it is volume 3 of the bundles, tab 11, page 6. (Pause).

Three of those four challenges have gone, so we only have number 1 left, the refusal to admit the hearing transcript and post-hearing brief from the ICSID case. I've in a sense taken your Ladyship to the material, we do suggest that the attempt to suggest that that represents apparent bias is an absolutely hopeless submission. It's overwhelmingly likely that any court in the same position would have reached the same outcome, and in any event the test is not would the court do something differently but have the arbitrators acted in a sense in a way so far outside what might have been expected that the very high threshold for court

intervention is triggered.

So we do say that that is hopeless.

There is also then --

MRS JUSTICE MOULDER: I'm sorry, what's bothering me is if you have to show that there is a risk of dissipation or diminution, how does the merits of the case affect that? I mean, if I -- I accept I'm not applying balance of probabilities, but I'm trying to work out whether or not there's a risk of dissipation or diminution. How is that affected by the merits of the challenge? I don't think I follow that.

MR FOXTON: Well, my Lady, that was the point, I --

MRS JUSTICE MOULDER: I know you say well, there's a discretion so you just throw it into the mix, but I don't understand where it could affect where I am setting the bar for risk.

MR FOXTON: The submission went a little further than that, my Lady, because we make two points --

MRS JUSTICE MOULDER: All right, I obviously haven't grasped it then.

MR FOXTON: The first is that a party who brings an obviously hopeless application inevitably raises the issue: what is the purpose of this if not to try and, as it were, kick the can down the road in order to allow an opportunity to make enforcement more difficult?

Now, I don't say that on its own that factor could be decisive but I do say that it is a factor that can be weighed in the balance with other factors when deciding whether the risk of the adverse consequence flowing from the section 68 application has been made out.

My Lady, the second ground is it evidences, we say, a continued course of conduct, and this is where your Ladyship came back to me and said well, it has all changed with the administrators, and I will come back to that. But a party who is absolutely determined to do everything it can to frustrate Vale's recovery or vindication of the loss it suffered as a result of the fraudulent misrepresentation, and that is a mindset or an attitude that does raise a greater risk of dissipation and prejudice during the period in which the section 68 application is live.

Now, my Lady, the only other matter relied upon is a suggestion that the tribunal failed to deal with an argument that was raised. I'm going to look over and ask Mr Gruder whether this really is live as a point.

MR GRUDER: Do you mean the frustration argument? No.

MR FOXTON: So the frustration point is not live so in fact now we're then down from five original complaints to one, and my Lady will see why we find echoes of Mr Justice Popplewell's comments back in 2017 coming

back.

Now, my Lady, given that, I then want to turn to why we say that the threshold for identifying a risk of dissipation or diminishing of the ability of BSGR to pay or of Vale to recover as a result of the existence of the section 68 challenge is made out here.

Now, my Lady, if this were an application for a freezing order and that analogy is drawn as we've seen in some of the cases, drawn by Mr Justice Picken in Progas, for example, I start from a case in which a tribunal of highly experienced arbitrators in an extremely thorough award has found that BSGR made repeated dishonest representations and that BSGR moved companies around between different ownership chains to assist in carrying out its deceptions. And also BSGR went to great lengths to conceal matters from Vale.

So if one considers the freezing order application coming to the court, we would be starting in that context from an extremely strong base of a party persistently found to have engaged in dishonesty and manipulation of the ownership chains of assets to perpetrate that dishonesty.

Second, BSGR has been found guilty of serious corruption by the Government of Guinea and similar findings by the tribunal, and BSGR's principal,

Mr Steinmetz, has been indicted in Switzerland on charges of corruption and forgery.

In considering the suggestion it's all the administrators now and not BSGR, my Lady should know that BSGR's solicitors have refused to confirm whether they are still in contact with Mr Steinmetz.

My Lady, third, the tribunal found that $500 million had been paid to BSGR in 2010 as a result of fraud and it rescinded the contract under which that $500 million was paid. Now, the result of that is it is open to Vale to seek to trace those proceeds into the hands of those who receive them and, of course, if money was paid out of BSGR at a stage when it had contingent exposures as a result of its dishonesty, BSGR itself would have remedies for the benefits of its creditors against those to whom the money has been paid.

Now, my Lady, if one asks whether the existence of the challenge application has made the vindication of those rights more difficult, we would say the answer is clearly yes. First of all, BSGR is using the challenge application as a basis for resisting the enforcement of the award in the US. It has even gone as far as to argue in the US that by reason of bringing the challenge the award has been suspended under the laws of the United Kingdom.

Now, that I'm afraid is simply a completely false statement of English law and one which Mr Gruder and Mr Quirk would never have associated themselves with. But the result is anyway that their application to resist enforcement has led to the -- has gone off, as it were, to be determined and is pending determination now, so it has been successful in buying time.

Secondly, the existence of the challenge application renders it impractical for Vale to wind up BSGR and pursue the remedies that would be available to BSGR itself against directors, shareholders and others who had received monies out of BSGR, because inevitably BSGR would contend that so long as there's a prospect of the award being set aside, no winding-up order should be made.

Now, my Lady, in addition we do say there is evidence of BSGR dissipating assets. The 500 million paid in 2010 was immediately moved out of BSGR to a Liechtenstein family trust, who distributed it to -- at least to the extent we have visibility -- related entities and companies.

Now, Mr Gruder says that happened before any allegations of bribery were made but by definition it happened at a stage when BSGR knew of its own conduct in bribing and knew of its own conduct in giving dishonest

answers to Vale in the context of the due diligence.

So we say there is a strong inference that moving the 500 million out at that stage was intended to make enforcement more difficult, if ever these matters came to light.

And there is no proper explanation for why this was done. There's been a suggestion from Mr Libson in evidence that some of these amounts were paid in repayment of indirect loans from the foundation. We asked for the loan documents and we were refused.

In addition, we say there is strong evidence that during the arbitration BSGR took steps to make enforcement more difficult. My Lady, for that we need to go to Mr Kelly's witness statement in bundle 1 at tab 3. (Pause).

My Lady, it's paragraph 26. So paragraph 26(a), this happened in 2015, shares in BSGR's subsidiary Octea were charged to a Bermudan company called Star West as security for I think effectively contingent liability under a guarantee for a loan. So there was a charge there to Star West in 2015.

What is said to be a claim open to BSGR against Mr George Soros has been secured in favour of a company called Litigation Solutions Limited, 26(b). Now, despite its name, we are not aware of any bona fide

litigation funder of that name, and my Lady will see from sub-paragraph (c) that we believe these companies, Litigation Solutions Limited and Star West, are connected because they have common directors and there's also a link between Star West and a company called Global Special Opportunities, which is a shareholder in Niron, a company that now stands to benefit from the concessions in Guinea as a result of a settlement arrangement -- I will come back to the status of it in due course -- with Guinea, which was announced I think at some point in the course of this year.

So we very much lay down the gauntlet that we believe all of these companies are linked. What do we get in response? Effectively there is no attempt to engage in that material at all. If one goes to Mr Libson on this, tab 5 of the same bundle, page 9, there is in paragraph 14 simply a refusal to engage.

Now, my Lady, the third matter, and I would hope to be able to deal with it in perhaps -- I don't know whether your Ladyship would be willing to then have a short break for the transcript writers?

MRS JUSTICE MOULDER: I think we should, yes.

MR FOXTON: My Lady, the third matter is covered relatively extensively in the skeleton, which is the settlement of the claim in the ICSID arbitration, where my Lady may

have seen that in February of this year BSGR's parent, Nysco and the Government of Guinea announced the settlement of their dispute. And the announcement said that a new group of investors presented by and including Mr Steinmetz will exploit the deposit in their place.

So one has there what appears to be a very significant, on its own case, asset of BSGR being the subject of highly relevant agreement between Nysco, its parent and Guinea, Mr Steinmetz being involved in relation to the so-called new investors coming in to take the benefit, and that all appears to have been done with no or minimal involvement from the administrators.

I'm just going to pick this up very briefly at bundle 2, tab 10, page 104.

MRS JUSTICE MOULDER: I'm sorry, what was the reference again?

MR FOXTON: Bundle 2, my Lady, tab 10, at page 104.

(Pause).

My Lady, what happened on 1 March, in the third paragraph, we were told that the parties, and I think that means BSGR and the Government of Guinea, although clearly BSGR's shareholders were also closely involved in this, provisionally agreed terms for a settlement that would involve an entity known as Niron Metals being granted a concession of one of the mines and then

entering into a revenue-sharing arrangement under which BSGR would be paid an agreed proportion of the revenues of that concession. And there's reference in that paragraph to the need for due diligence to be performed by the administrators, and the administrators take the position that this is not a binding settlement because the terms of it, as it were, are subject to contract. But my Lady will see at the bottom of the page that they were provided with the signed term sheet on 24 February --

MRS JUSTICE MOULDER: Sorry, I'm not sure I'm on the right page. Can you give me the page reference again?

MR FOXTON: My Lady, it's the large number, 104, at the bottom of the page. It should be the first page of a letter from BDO.

MRS JUSTICE MOULDER: Sorry, I was out by a page. I'm looking at the wrong ...

MR FOXTON: No, the numbers are, alas, different but very close to each other, which never helps.

MRS JUSTICE MOULDER: Right.

MR FOXTON: Perhaps I could ask my Lady to read the third and fourth paragraphs on page 104. (Pause).

MRS JUSTICE MOULDER: Yes.

MR FOXTON: So, my Lady, just a couple of points briefly to pick up on this. The first is although apparently the

administrators have done due diligence or are going to be doing due diligence on Niron, they have refused to engage with our queries as to who beneficially lies behind Niron and what role Mr Steinmetz has in relation to it. Certainly the press releases would suggest that he clearly is involved in this, and my Lady will well understand our concern that the effect of this settlement, leaving its legal status aside for the moment, is that those against whom claims would undoubtedly lie and who are very closely linked with the dishonesty the tribunal has found will be benefiting from the proposed deal with the Government of Guinea, and as at the moment no indication at all as to how it is BSGR will benefit from this arrangement.

My Lady, secondly, although it is said by the administrators and is still said by them this is all subject to contract and nothing has changed, the reality is that on the ground things are changing. The Government of Guinea and Nysco have announced this settlement as though it is a done deal. That press release is at bundle 1, tab 7, page 70. The words "done deal" are not mine, they come from a Nysco statement as reported by The Sunday Times.

And, my Lady, the Government of Guinea has already launched a tender for the award of the new mining

rights. One sees that in bundle 2, tab 10, page 94. One has the tender notice and the Government of Guinea saying:

"To reach a full amicable agreement in March 2019 the Republic of Guinea and BSGR finally ended their dispute before the ICSID and the blocks are now in the portfolio of the state free of any dispute."

So whatever the position may be in terms of paper, the reality is that the events on the grounds are moving fast and the administrators' ability to influence or control them is plainly non-existent.

My Lady, I don't know if that would be a convenient moment?

MRS JUSTICE MOULDER: Well, yes, I don't know to what extent you're going to come back on this but it seems to me that Mr Kelly -- and I'm looking at his third witness statement -- makes a number of statements which indicate that he doesn't seem to believe what Mr Cohen is saying, and so even if you're right that practically Guinea has launched a tender or things are moving on, what Mr Cohen says is, "Well, we're getting something in return".

Now, as I say, I don't know to what extent you're going to take me through this, but it seems to me that I have evidence saying, "Well, yes, this may be happening or is happening, we're negotiating it, but we

are the administrators and we are negotiating something in return". Now, as I say, Mr Kelly makes a number of quite striking assertions that he doesn't believe a word of what Mr Cohen is saying and I don't know, as I say, whether you intend to rely on that evidence or pursue it, but I'm not sure that it's enough to say, well, practically these rights are being mined if in fact something is being received in return.

MR FOXTON: Nothing is being received now, that is not Mr Cohen's evidence. He says, "We are negotiating" --

MRS JUSTICE MOULDER: Yes, he doesn't -- well, as I say, I think we should have the break now but I don't read this as Mr Cohen saying, "Oh yes, terribly sorry, we seem to have given away an asset here". Mr Cohen says, "We are administrators. We act in the best interests of the company and the creditors", and although he doesn't say, "guess what", he says, "We don't go around giving away assets". In effect he says, "We are going to get something back".

Now, as I say, Mr Kelly says effectively, "I don't believe a word of it". I leave it to you as to whether or not that was actually --

MR FOXTON: Well, my Lady, I don't accept that --

MRS JUSTICE MOULDER: -- the case that you're pursuing.

MR FOXTON: -- I don't accept that characterisation of

Mr Kelly's evidence --

MRS JUSTICE MOULDER: As I say perhaps we should look at it -- I think we should take the break now but Mr Kelly certainly seems to make --

MR FOXTON: -- and I will come back to that.

MRS JUSTICE MOULDER: -- some quite surprising statements.

MR FOXTON: Well, they are in response to very surprising statements by Mr Cohen, my Lady.

MRS JUSTICE MOULDER: As I say, if you want to go there but I don't think we can just ignore it.

MR FOXTON: No, I will certainly go there to the extent to which I put the matters to your Ladyship and they do not involve --

MRS JUSTICE MOULDER: As I say, what I'm putting to you, the reason I am raising it is not that I -- it's up to you, obviously how you put your case. But you are saying to me this asset has gone, look at the press releases, Guinea are now going out to tender. That's dissipation, or risk of dissipation. What I am saying to you is you cannot, I would have thought, just ignore the fact that there is evidence from Mr Cohen saying this is not a case of the asset just going, there is something being received in return.

MR FOXTON: No. Well, I'm not ignoring it, my Lady, but one can only make the submissions in sequence so I will come

back to that after the break.

MRS JUSTICE MOULDER: Fine. We will take ten minutes. Thank you.

(11.49 am)

(A short break)

(11.59 am)

MRS JUSTICE MOULDER: Yes, Mr Foxton.

MR FOXTON: So, my Lady, just coming back to the settlement of the ICSID tribunal, the first point is of course the entire structure was apparently negotiated by management and Guinea without the administrators' involvement. The administrator tells us that on 24 February, I think, they are presented with the draft terms of settlement and told, "That's it, non-negotiable".

Secondly, it's quite clear that the terms of any revenue-sharing agreement by which BSGR would get anything out of this have yet to be agreed. That was the position as confirmed by the administrators on 27 March this year and we have had nothing through from BSGR or the administrators to suggest that matters have moved on in relation to revenue-sharing.

The problem is matters are moving on on the ground in relation to the concession, and so saying, "Well, we will do a deal in which we will get something back yet to be determined", does not address the fundamental

difficulty that the ability to roll any of this back if no acceptable deal is offered is being compromised by the speed with which events are actually moving on the ground in relation to the concessions.

My Lady, the third point is this: the structure of the deal involves at least an indeterminate part, and we don't know of the value of any settlement going off to a different entity other than the creditors, namely the new investor. And we have no knowledge, but a good deal of suspicion, that part of the benefit will be going to those involved in the management of the company and indeed those closely involved in the matters that have given rise to such serious findings by the tribunal and investigations by others. The existence of the administration and the administrators has been powerless to prevent that state of affairs coming into existence.

My Lady --

MRS JUSTICE MOULDER: So when Mr Cohen says:

"No binding deal had been reached, and none would be reached without the joint administrators being satisfied that such a deal is overall in the best interests of BSGR and its creditors."

You say that's not right?

MR FOXTON: No, I'm saying whether there is a binding deal as a matter of contract or not alas does not answer the

question, because meanwhile Guinea, and indeed BSGR's shareholders in their announcements and the new investor, are all charging on regardless.

MRS JUSTICE MOULDER: Yes, but the second half of that sentence states:

"... none would be reached without the joint administrators being satisfied that such a deal is overall in the best interests of BSGR and its creditors."

Now, whether or not payments are going off to third parties, whether or not they are connected parties, I'm not sure what you say to the fact that the administrators say even if we -- well, they do say, "Yes, we were given this deal. No, we didn't get any involvement in negotiating it, but we wouldn't have done it if we weren't satisfied it was in the best interests". So are you asking me to say that the administrators are mistaken?

MR FOXTON: Well, they haven't done the deal yet. The administrators don't say they have committed themselves to anything as yet. They are saying, "We will not do a deal unless we are satisfied", and I take them at their word on that. The problem is their statement, "We will not do a deal in the future", does not change the fact that the new investor is currently working away and

all that not doing a deal would achieve is BSGR not getting any revenue share. It's not going to be able to change what's actually happening on the ground at the mines and who is extracting economic benefit from them in Guinea.

The problem is the administrators' focus on the status of the settlement document as regards BSGR does not answer our concern that regardless of that state of affairs, the people in control of the position on the ground are moving on as though that is not a significant threshold that needs to be crossed before anything happens.

Now, if that's right, all that the administrators' refusal to do a deal would achieve is BSGR not getting the revenue share of the revenue that the new investors were making from this.

My Lady, one suspects, although I understand why they don't go into this, that the administrators would far rather have been involved in all these discussions with Guinea while they were going on, rather than simply being presented with a term sheet at the end of February and told, "That's it".

MRS JUSTICE MOULDER: And the fact that they say:

"We would be entitled to recommence the ICSID arbitration at our discretion if a binding agreement

appropriately benefiting BSGR and its creditors is not reached."

You take no comfort from that either?

MR FOXTON: Well, the problem is certainly a world in which the concessions might be reinstated will have been fundamentally changed if someone else is in there on the ground, and to the extent to which management who may be crucial elements in supporting and giving evidence at that hearing are in fact deriving benefits under the new arrangements, it's hardly conducive to a world in which that arbitration will be --

MR GRUDER: My learned friend is in fact mistaken. There is no further evidence to be given in the ICSID arbitration. The evidence has finished. All that is awaited is an award but the arbitrators have been told to suspend work on that pending a possible settlement.

MR FOXTON: Well, my Lady, if that award comes out and says, "You can have the concession back", how, in practical terms can that ever be accomplished if in reality new investors are in on the ground exploiting the concession, having been asked to tender by the Government of Guinea on the basis that there's been a deal done between BSGR's parent, Nysco and the Government of Guinea, and these blocks are now entirely free of third-party claims?

I'm afraid sometimes you cannot get the wine back in the bottle, and that is the reality of the position that the administrators, through no fault of their own, were presented with when handed this term sheet at the end of February.

Now, my Lady, in relation to just -- before I finish there's one other matter I should pick up, and Mr Gruder's rising to his feet just now reminds me of it, that in the break we were told that he had misspoken and in fact the failure to deal with the frustration point is not being abandoned, so I'm afraid that we have another flip-flop back on that point. I think the fastest on record in relation to BSGR's positions to date.

Now, my Lady, in relation to other matters on the administration, first of all, the fact that they were put in, in the words of one of BSGR's directors, Mr Cramer, "To put sharks in the moat and make sure BSGR can stay the distance on the arbitration and litigation even if there are adverse awards or developments", is not a particularly encouraging position for a creditor of BSGR to be faced with.

My Lady will have seen the funding arrangements of the administration give Nysco, the shareholder effectively owned by Mr Steinmetz and his Liechtenstein

foundation, extensive practical control over what is done because they have to approve the budget, approve drawdowns and approve the purpose for which funds will be used.

And the drawdown requests have to be sent to a Mr Bonnant who is Mr Steinmetz's personal Swiss lawyer and friend. So, my Lady, the result of that is the terms on which the administration have been established give Mr Steinmetz, give Nysco, extensive influence over what will be done and the result of that is the administrators are never going to be an effective means of pursuing claims against the management of BSGR or parties related to Mr Steinmetz or Nysco in respect of any benefits that they have received. That is simply an inevitable product --

MRS JUSTICE MOULDER: So, back to the beginning, how does the fact that you say the administrators are not an effective means of pursuing claims link with a risk of dissipation arising from the challenge? Because it's the case in all administrations that the administrators can only act to the extent that they are funded, but the administrators are very clear, at least in their own evidence -- it appears to be challenged in yours -- that they are taking the decisions and at the end of the day it is their decision whether something is in the best

interests of the creditors.

So I'm not sure that I have followed the link between what you say are the limitations on the administrators and how those limitations, which, as I say, appear to me to apply to all administrations, mean that this challenge is giving rise to a risk of diminution.

MR FOXTON: My Lady, for these reasons. First of all, as I mentioned at the outset, but for the challenge we could wind up BSGR. One could appoint receivers by way of equitable execution over its assets. So instead of part -- administrators being funded by and subject to financial control by Mr Steinmetz and Nysco, you would have parties in control of the claims of BSGR or in control of its assets that would not be subject to those constraints.

And, my Lady, secondly, the distinguishing feature of the funding arrangement here is the fact that those with their hands on the purse strings are very closely linked, or in some cases the same as, individuals about whose conduct there is very serious cause for concern.

In relation to Mr Steinmetz obviously the criminal investigations of him. But also in relation simply to the whole underlying factual strata of bribery and fraudulent misrepresentation, my Lady, I would suggest

that a situation in which those funding the administration are the most credible third party against whom potential claims might be brought is far from a routine aspect of administrations, in my experience.

So, my Lady, in broad terms that is why we say that the section 70(7) criteria are met here. I should just deal with one other point, we are not by this relief seeking to leapfrog other creditors. I don't know if there are any other substantial creditors, but in any event we accept that it would be open to the English courts to decide how any funds paid as a condition of any order should be distributed to avoid Vale obtaining any inappropriate advantage in the context of an eventual insolvency.

So we are not looking to advance our position. We're simply looking to preserve it from the detriment that would otherwise follow.

My Lady, that leaves, in terms of my applications, security for costs, where the issue is principally one of quantum.

Now, our estimate is in bundle 1, tab 7, pages 86 to 88. (Pause).

My Lady, the total estimate is $885,000. It's on page 88. But we have made it clear the amount of security that we seek is 80% of that figure, which is

$710,000. We are not seeking 100% security.

Now, my Lady, the first point we make is that there is a real prospect here of indemnity costs being ordered if this challenge fails, and where prospect of indemnity costs is reasonable rather than speculative, the appropriate perspective from which to view security is the amount that would be recovered when costs are ordered on an indemnity basis. We do so against the background of the prior history of BSGR's failed challenges to many tribunals, the seriousness of the challenges that have been made and abandoned and in due course the fact that the frustration defence is advanced, then abandoned, then advanced again within the space of a few moments.

So we do say that the prospect of indemnity costs are high. At the hearing before Mr Justice Popplewell we recovered about 87% of our costs on an indemnity basis.

BSGR suggests the appropriate figure is $511,000 or about 58% of the amount claimed. Now, if we are right that security should be assessed on the assumption there's a reasonable prospect of indemnity costs, that in itself would involve a very significant uplift to be BSGR's figure. But in any event we say that this is clearly a huge underlying claim, $2 billion now

including interest, a case with an incredibly lengthy procedural history -- arbitrations started in 2014 -- numerous decisions, prior court applications that are going to be part of both parties' evidence, and in those circumstances it is a matter for which significant solicitor time in relation to preparation and filing of evidence is appropriate.

The rates that Mishcon de Reya are charging BSGR are significantly below current market rates and, my Lady, taking those matters together, and it is one of those issues I think I approach with a broad brush, not with any lack of respect for the points but I sometimes think that courts may be more interested in the highlight issues than delving into detail, but the figure of security we have put forward is a reasonable one that I would invite your Ladyship to order.

So, my Lady, that I think is all I wanted to say in relation to our applications, and I will obviously respond to BSGR's applications after you've heard from Mr Gruder.

MRS JUSTICE MOULDER: Thank you.

Submissions by MR GRUDER

MR GRUDER: My Lady, I will deal with my learned friend's applications in the same order he put them forward.

Now, my Lady has already looked at Progas and

I won't go to that again but there are a number of principles which come from that, that you are looking for prejudice arising from the challenge. So you're only looking for prejudice from the date of the challenge until the date of the hearing, which in this case is from May until November of this year.

Secondly, it's not prejudice that the challenge may delay enforcement and the purpose of the right under section 77 or the court's power is not to make it easier for the claimant to enforce the award or to provide security for the award as a general rule. The real question on the facts of the case and the way the authorities go is has my learned friend been able to show that there is a risk of dissipation equivalent to the requirement for an asset freezing injunction? Well, either from May -- it doesn't really matter -- or indeed from today until November?

Of course, so much is made by my learned friend as to the findings in the award, the so-called -- what he calls "guerrilla tactics", which I will possibly deal with later, and the conduct of the previous -- of the management, those previously in control of the company.

But we say that if we are looking at a test which is looking at the position from the date of the application earlier this year until the end of November, when it's

the hearing, of course my Lady knows that it's not the previous management who have got power to act for the company, it's not the previous management who have got control of the assets of the company, it is the administrators and the administrators are people of experience, repute and integrity who are leading administrators working for one of the leading accountancy firms in this country.

It is significant that although my learned friend seeks to justify some of the imputations -- in my respectful submission, scandalous imputations -- in Mr Kelly's third witness statement, if one looks at what they say in their skeleton argument, their skeleton argument expressly disclaims any imputation as to the conduct or the bona fides of the administrators, and that's obviously correct.

Then if one just, as a brief overview, looks at the two assets which Vale focus on, the first asset is the settlement of the ICSID arbitration.

Now, if one looks at what is, if they are right, the value of that claim in the arbitration, because they, of course, argued in the arbitration and at the moment have got an award which says that this concession was obtained by bribery and corruption. And that is the basis upon which the Guinea authorities stripped the

company of its concession and that is the matter which was litigated or was arbitrated in the ICSID arbitration.

If Vale are right, if the arbitration award is correct, the ICSID arbitration, which is said to be an asset of such value that it has been dissipated by this settlement, is actually valueless, because the stripping of the company of the right to the concession was actually justified. Therefore, on one view of the matter the settlement or the draft settlement or any settlement of that ICSID arbitration which provides value for the creditors of the company is not a detriment to those creditors, but a benefit, because on Vale's own case that claim is valueless, or virtually valueless.

Secondly, the Soros arbitration. The Soros arbitration is something which Mr Kelly makes fun of. He says, and I'm not necessarily quoting directly, it's a sort of hobby horse of Mr Steinmetz, where he treats it slightly contemptuously. It is something which BSGR asked Vale to help them finance and to co-operate in that claim. Vale refused. So what BSGR have done, they have a got a litigation funder to fund it on the basis of a 50% recovery. Vale didn't want to finance it. Vale laugh at this claim and yet for the purpose of this

application they seek to say that funding it on the basis of a 50% share to the funder, whoever that funder is, is stripping the company of its assets. Again, one should look at what they say with a certain amount of common sense, with all due respect.

Then they then say, "Well, why would a party seek to bring a section 68 other than to provide an opportunity to somehow dissipate its assets?" With due respect, any commercial company, any administrators, or indeed company management, if a company is not in administration, who are on the receiving end of a $2 billion award against them, and if they are told there is a reasonable prospect of success -- even if my learned friend is right, which we don't agree, there's a flimsy prospect of success, where the costs will be, in comparison to the 2 billion award, fairly minimal -- of course any sensible management would pursue that avenue. In my respectful submission, my learned friend is really barking up the wrong tree and really making a misconceived application. So merely to make the section 68 application, merely to exercise a right available to you under the Arbitration Act, is itself evidence of an intention to dissipate.

If one looks at this, the position is that we are dealing with a company under the control of

administrators. A duty of an administrator, the role of an administrator, is to get in the assets for the purpose of the creditors, to act in a bona fide way for the benefit of those creditors and the benefit of the company. And in my respectful submission, this is what these administrators are doing and it is paragraph 56 of Vale's skeleton, where they say:

"The management of BSGR are the type of people who will do everything in their power to prevent enforcement."

But not the administrators.

So we are dealing -- it is paragraph 56 of their skeleton on page 28 of their skeleton:

"The evidence shows that BSGR's management, excluding the administrators and owners, are precisely the sort of people who will do everything in their power to prevent Vale obtaining the sums awarded it to by the tribunal."

So the people who are in control of the company and have the power, and have had power since 2018, to act on behalf of the company are not the sort of people who would do everything in their power to prevent Vale obtaining the sums awarded to it by the tribunal. That is their case.

So how can it be that they can then seek to put

forward submissions before you, and Mr Kelly can seek to make those serious allegations in witness statement number 3, when they themselves say that the administrators are not those type of people?

Now, if I can come to deal with some of the other points my learned friend makes, both in his skeleton and orally, he talks -- a lot of play is made about the conduct of the arbitration, the guerrilla tactics. With due respect, whether my learned friend is right or wrong, and we do not accept that that's the position, he is making imputations about those who were in control and had power to act on behalf of the company before the administration. The administrators, including Mr Cohen, only came to control the company and had power to act for the company in 2018.

The award was not at that point out, but effectively the arbitration or at least the evidential part of the arbitration was over and the arbitrators were deliberating, as they had for two years, over the award.

Then there's a reference to Mr Justice Popplewell's order, the fact that the costs have not been paid. Again, that is something which was done. These applications were made under the control of the management before the administrators were there. Again, my learned friend made some play about the movement

upstream in 2010 of the 500 million paid by Vale to BSGR. There are a number of points on that. Again, that pre-dated the involvement of the administrators by eight years. But we also say that, with all due respect, the idea that these monies were moved immediately after Vale paid the 500 million, because the management of BSGR were -- could have foreseen circumstances in which the President would die, then there would be a new President who would then strip them of their concessions and that would then lead at some point in the future to Vale bringing a claim in fraud against BSGR, with due respect, is very far-fetched.

Then one has the reference my learned friend said to the shares in Octea, which owns a diamond mine in Sierra Leone. They were -- and in Libson, paragraph 2, the second witness statement of Libson, paragraph 13(b)(i). That was a diamond mine in Sierra Leone where the shares were previously charged to Standard Chartered. The bank subsequently sold its debt to Star West Investments. Again, this pre-dated the arbitration, let alone the section 68 application.

Then it's then said, well, the directors still control BSGR or have some involvement. Mr Cohen has made absolutely clear on oath that the directors do not exercise control over BSGR, and he says at A4/10:

"These amount to serious allegations against the joint administrators which are entirely unsupported and should not have been made."

Then one then has the position about the settlement. Now, the settlement is not a final settlement, and that is the evidence of Mr Cohen and one has a term sheet which my learned friend didn't take you to at bundle 2, tab 10, page 77. And on page 77 it sets out the parties and at 1.3:

"The parties recognise that a comprehensive and equitable settlement of the dispute is in the best interest of all parties. Parties waive the claims expressed in procedure and ... are pleased to work together to enable development of a world-class mining project to profit the people of Guinea. The people of Guinea decides the valuation of its mineral resources, in particular iron, to improve the living condition of the population."

Then if one goes to 1.5:

"If the general terms and conditions presented in this document are accepted, the parties will prepare a transaction with a view to formalising their agreement."

And then at 2.2:

"As a prior condition to any agreement, BSGR must

provide the evidence that it has the power and authority required to conclude this agreement with the Republic of Guinea and that the prior approval of jurisdictions of Guinea or the -- Guernsey or the administrators of BSGR Guinea Ltd will not be required."

Then 2.4:

"In return that the Republic of Guinea request the BSGR adviser to prevent a new investor."

So this is a term sheet. It is not binding. It's not going to be agreed to by the administrators unless they regard the overall transaction, the overall settlement, as in the best interests of the creditors. They expressly say that there will be a -- any approval will be subject to the sanction of the Royal Court of Guernsey, and then my learned friend says, "ah", he says, there appear to be from press releases activities on the ground and it may not be -- one may not be able to roll back those activities. With all due respect, that's not correct because if one takes a step backwards, BSGR at the moment don't have any rights to any mines in Guinea. Those rights were stripped from the joint venture company by the decision of the Guinea government. That led to the ICSID arbitration. The ICSID arbitration was then heard and the process has been suspended pending the agreement.

If the agreement doesn't go ahead, the rolling back will not be BSGR effectively mining the concession, it will be BSGR reviving the ICSID arbitration which will not really incur any cost, or minimal cost, because all the evidence and the argument is over, it will just be the arbitrators continuing or reviving, if I can put it that way, their deliberations.

That would then, if BSGR's case is a good one, lead to an award in their favour or, if Vale's allegations are correct, lead to an award against them.

My learned friend then says, well, there's all these potential claims against the previous management or the previous controllers of BSGR and, of course, Nysco, which finances the administrators, is very unlikely to finance a claim against Mr Steinmetz or those who were in control of the company previously.

Now, the funding agreement does not prevent -- does not prevent the administrators getting funding from other sources for other claims, and, indeed, the administrators have said to Vale, "If you want us to pursue claims against the previous management, are you willing to fund it?" The answer was no, they were not willing to fund it. So it ill lies in their mouth, having been approached to and been requested as to their willingness to fund these claims, to say that the

arbitrators -- sorry, the administrators can't pursue these claims because they are being funded by Nysco.

So, again, with all due respect, we can see that many of the points here are manufactured, if I can put it this way, in order to justify a claim for security the purpose of which is to stifle a section 68 application.

And of course any rights that there may be in the -- in relation to the ICSID arbitration, any settlement, are not prejudiced until the agreement is actually binding and approved by the court. As I've said before, that will not happen -- that has not happened. That will not happen unless the administrators consider the agreement to be in the best interests of the company and it's approved by the court.

Now, these administrators, some of the evidence and some of the submissions seek to imply that they are really patsies of the previous management.

Now, these are people -- a firm, BDO, who are extremely well known and with all due respect people like Mr Cohen and his co-administrator, with many decades, probably 30 years of experience, are not going to prejudice their reputation and are not going to prostitute their integrity merely for the sake of pleasing the previous management for the sake of

whatever fees they may have got or may possibly get for this administration. With due respect, that, I would submit, is not a submission which should be -- which should be given credence.

So if one looks -- and I should show you briefly the funding agreement, since I've made submissions on that. That's at volume 2, at page 107. I'm sorry, I think -- sorry, page 26. (Pause).

The particular provision I would like to show you is 2.6:

"Notwithstanding the purposes of the facilities, the parent is not directly engaging the administrators and this agreement does not seek to replace the statutory requirements or any commonly accepted industry guidance relating to the conduct in administrations of this nature generally. The parent hereby agrees and acknowledges that nothing in this agreement or in the arrangements contemplated by it shall fetter or prejudice the administrators' statutory duties and obligations."

So at the end of the day, if they decide that they want to or they think it's proper to pursue the previous management, then if they can get funding for that they will do so.

Now, there are numerous points which are made in the

skeleton which Mr Foxton never necessarily adumbrated orally, or at least didn't stress orally. But, for example, it's then said, well, there are 268 hours in the budget per year, or in the previous year -- I think from 2018 to 2019 -- for meetings with the former management.

Now, that equates to 22 hours per month and for the administrators and their staff to deal with and talk to and get information from the previous management who have got obviously a greater familiarity with the activities of the company and the background to the dispute and so on is in no way excessive.

I think they seem to -- they put it forward as eight weeks as if it is something unbelievable, but if you really look at 22 hours per month, that, in my submission, is entirely reasonable.

We say on this application that BSGR is in administration. Its joint administrators' role is to bring in and preserve assets for the sake of the company and its creditors. That is the very opposite of dissipation. And we say Mr Kelly's attempts to cast aspersions on Mr Cohen are without any merit whatsoever.

Furthermore, we say if I'm wrong on this, 500 million, how is that amount justified? How do they -- they say, well, it's sort of a reasonable

estimate. Surely if the purpose of security is to protect a claimant who is the beneficiary of an arbitration award against dissipation, the amount of security should bear some relationship to the value of the assets which might be dissipated.

So, for example, if one has a party which has an award against it for $10 million but the evidence shows that it doesn't have any more than $250,000, and suppose the evidence shows that that asset, let's say it's a sum of money in a bank account, might be dissipated because the evidence shows that the people in control of the company are dishonest and are the type of people who might dissipate their assets, then the maximum the court should actually award as security should be the amount of the money which might be dissipated.

Now, there is no evidence here that 500 million, with all due respect, is in jeopardy at all. If one actually looks at the assets which people have focused on, there's the ICSID arbitration which -- with all due respect, there really is no risk of it being dissipated within the next two and a half months, and the Soros claim, which Mr Kelly treats as a joke.

So, with due respect, there is no relationship -- even if there was power to grant security under

section 70(7), which in my submission there isn't, the court should not do so, consistent with the authorities, there is no relationship between the power and the amount of money the other side want.

So in my submission my learned friend completely fails on that ground.

We say that actually what is the true purpose of this? Obviously, it's intended to stifle the section 68 application or provide security for the award, both of which, on the authorities, are not legitimate purposes.

So then it's then said, although I see my learned friend didn't pursue it orally, well, they should have under section 70(7) security, well, for the Popplewell costs order or the LCIA deposits which we didn't pay.

We say that again is a totally illegitimate application. The only power given to the court is the power given under section 70(7):

"The court may order that any money payable under the award shall be brought into court or otherwise secured."

There's no power to say, well, they have been naughty boys because two years ago they didn't pay a costs award on a challenge, order them to bring that into court as a condition of pursuing their section 68. That's not legitimate.

There is also another point about the LCIA deposits which we've dealt with in our skeleton.

So that's what we say about that.

If I can just deal with perhaps one or two points on the merits of the application, although I would submit that -- my learned friend says it's flimsy. Well, with due respect, I accept that when a party is seeking security for section -- for -- security when another -- when the unsuccessful party in an arbitration is making an application under section 68, it is not necessary for him to prove that the section 68 application is flimsy. It's only necessary for him to prove that a section 67 application is flimsy if an application is made under that section.

But at the end of the day, whether our application is flimsy or stronger than flimsy is actually irrelevant, because if this were a section 67 application, which it is not, there would be two requirements. One, for Mr Foxton to show my application is flimsy and, two, to satisfy the test in Progas about dissipation of assets and so on.

Now, if, in a section 67 application -- even though a party shows the application is flimsy, he still has to satisfy, if I can call it this for shorthand, the dissipation test. Where does it get my learned friend

to seek to show that the application in this case is flimsy? Because it's not a requirement and he's still got to satisfy the dissipation test.

The dissipation test cannot be satisfied here for all the reasons which I have put forward.

And in our skeleton we set out in some detail why we say that this is a justified section 68 application. We say that in fact if one looks -- one, it was always the case that bribery and corruption was at the centre of this arbitration, and I'm not going to deal with this for long because it's frankly noise and prejudice which the other side is seeking to put forward to obfuscate the true legal test for security. But, for example, if one goes to the first witness statement of Mr Kelly and go at Kelly 1 at paragraph 31, which is I think bundle C--- or section C, which is tab 13 at page 10. I think one finds that in volume 3.

So it's volume 3, tab 13, page 10. Mr Kelly says this, paragraph 31:

"The LCIA tribunal found that BSGR was liable for fraudulent misrepresentation. It found that BSGR had engaged in the deliberate concealment of its arrangements with an entity called Pentler Holdings, of which Madame Touré, the wife of a former President of Guinea, President Condé, was a shareholder, because BSGR

wished to ensure that Vale remained ignorant of Pentler and its dealings with the various contacts who have assisted BSGR Guinea in obtaining the mining rights.

"Further, the LCIA tribunal found that Pentler, and therefore Madame Touré, had received shares from BSGR in order to secure her influence over President Condé. In short, the LCIA tribunal found that BSGR had bribed Madame Touré and then lied to Vale about it."

Now, that's how Mr Kelly, in his first witness statement, sworn well after the award, summarises the case.

Now, it's of course said now, "Ah, but we were found guilty of fraudulent misrepresentation on grounds which were not directly related to bribery but to indicia of bribery, or red flags relating to bribery. That's what it comes to.

But if one -- we say that the tribunal's decision as to dishonesty, because it's not enough to show that we made misrepresentations, but the tribunal's decision as -- that they were fraudulent is effectively affected be their decision on bribery and corruption.

Of course, the ICSID transcripts, which we wanted to put in and which we were refused, are transcripts that go directly -- and we've set it out in our skeleton, and I'm not going to repeat it -- directly to the issue of

bribery and corruption.

It's one thing to say, "Ah, the Thiam evidence was put in with the consent of both parties". It was. But of course the Thiam evidence related to criminal proceedings to which neither party was present, and the tribunal never saw any problem in evaluating that in the context of the evidence which they had.

But when we tried to put in evidence which went directly to the question of bribery and corruption, they never made a ruling, despite us asking them to deal with it. They never made a ruling for effectively nearly two years until they came out with their final award and then decided not to admit the evidence.

Now, my learned friend's case is, ah, well it doesn't matter whether you're right or wrong because you would have lost anyway on other points. And we disagree with that because of what I've said about dishonesty and the fact that they found dishonesty based upon the fact that we were the type of people who would corrupt the Guinea government and therefore had something to hide.

Now, also I think my learned friend accepts or my learned friend says, well, there is no substantial injustice, he says, because the decision would be the same, but on other grounds, even if you're right.

He does accept in his skeleton argument that if

a party -- if the tribunal is in breach of natural justice, then that itself is a serious irregularity.

The other point I would wish to make is that in our respectful submission section 68 requires the serious irregularity to cause substantial injustice to the applicant. Not the same test as one has under section 69 that the serious -- that -- in section 69 the test is does it -- does the error of law substantially affect the rights of the parties? In my respectful submission, there is a difference in those cases because, of course, a party -- a prominent businessman and company in the mining field which is found guilty of bribery and corruption, because the arbitrators have not allowed in evidence which would exculpate them, suffers a substantial injustice. Its not enough for the other side to say, "Well, you would have a lost anyway".

If I can give my Lady an example. Supposing a judge was involved in an arbitration and there was a claim made that the judge was liable on two grounds: one, fraud and dishonesty and, secondly, strict contractual obligation. Supposing the tribunal so misconducted itself that it refused to allow in evidence which would or might exculpate the judge from the charge of dishonesty. Is it sufficient for the winning party to say to the judge when he comes in front of the court on

a section 68 application, "Well, it doesn't matter that the arbitrators didn't allow in evidence which might exculpate you on a charge of dishonesty because you would have lost on a strict contractual basis anyway"?

Now, of course we say that there would in those circumstances be a substantial injustice and they, well, does it substantially affect your rights? But we say that's not the test.

But of course, our primary case is that if this evidence had been allowed in -- and we say it was totally wrong not to allow it in -- we might well have been found innocent of bribery and corruption and that would have affected their conclusion on whether we -- whether the misrepresentations were put forward dishonestly, or at the very least would have affected their decision on costs, because their decision on costs was expressly -- paragraph 994 of the award expressly relied upon the findings of the tribunal regarding bribery, and costs were I think 16 million.

If I can stop there, my Lady, I've virtually finished security for the claim. I'll go on to security for costs and then my application under section 66.

MRS JUSTICE MOULDER: All right. Thank you very much. We'll come back at 2 o'clock, please.

(1.01 pm)

(The luncheon adjournment)

(2.00 pm)

MR GRUDER: My Lady, apart from three very short points, I've finished with security for the claim point and the points are this. One, we are are dealing with a period of two and a half months.

Secondly, the company doesn't have any liquid assets. That's why it's got to borrow funding or the administrators have got to borrow money to fund their operations and the exercise all of their duties.

Thirdly, when it comes to the settlement, the question the administrators have got to ask themselves is: is the overall package in the best interests of the company and its creditors? If part of the package gives benefits to other parties like Niron, or Mr Foxton says Mr Steinmetz, that's part of their assessment.

So those are my submissions on security for the claim. I come to security for costs and --

MRS JUSTICE MOULDER: Sorry, just before you do, you say, "No liquid assets". I had gathered from the skeletons that you weren't running an argument that the claim would be stifled and I think the point had been taken that there was no evidence as to what other sources of funding were there. So I'm not quite sure when you say, "No liquid assets" --

MR GRUDER: Well, the administrators have got no -- there is no liquid assets. That point goes much more to the risk of dissipation rather than the --
MRS JUSTICE MOULDER: I see.
MR GRUDER: -- stifling. We don't take a stifling point, because there isn't evidence before the court as to --
MRS JUSTICE MOULDER: Right, thank you.
MR GRUDER: -- the wherewithal of other people.

So if we can come to the question of security for costs, we deal with this in paragraphs 30 and following of our skeleton, and the issue really has boiled -- although the other side claim 880,000-odd, they now claim 710,000 and we say it's 51,445 [sic]. I'm not going to repeat all the submissions we have made. My Lady has obviously read them.

The point I would like to do is at page 17 of our skeleton, paragraph 37, we break down the 885,000 which the other side originally claimed and upon which the 710,000 is based and one sees the solicitors' estimate, so estimated for the future, between now and November, $347,000.

We comment on that in paragraph 39. So they estimate that their solicitors -- 530.5 hours of solicitors' time between now and the challenge application in November, for the matters we set out

there.

Now 530.5 hours in respect of an application where the evidence is there, it's before the court, is, we say, grossly excessive. And I would just -- I know perhaps it's almost an unspoken convention not to comment on counsel's fees, but it has not escaped -- it wouldn't escape my Lady's attention that a 45-page skeleton was put in by the other side. The first 20 pages of that skeleton effectively rehearsed arguments which will be made by the other side on the section 68. By the Commercial Court practice, they are only entitled to put in a 25-page skeleton argument.

Now, they broke that direction and perhaps one can excuse them. We don't take a point on that at the moment, but one can excuse them, because there were a number of applications today, although we managed to keep our skeleton within the 25 pages.

The point I'm really saying is they are seeking a further $365,000 security for counsel's fees and one asks oneself has not at least a substantial proportion of that work already been done for the purpose of putting in a lengthy introduction trying to persuade my Lady how weak our challenge is? That's the only point I make, that there must be, with all due respect, very substantial duplication between the costs that have

already been incurred for today and the costs that they say will be incurred for the November hearing. So that's the points I make on the security for costs.

Application by MR GRUDER

MR GRUDER: If I can then come to my application, which is the section 66 application, and one needs to, I think, go to Mr Justice Bryan's order which one finds at bundle 5, tab 19. I think it's necessary for one to just put it in context, one sees the order that was obtained without notice, perfectly properly, at page 1 of tab 19. Then on page 2 they gave the claimant permission under section 66 of the Arbitration Act to enforce the award in the same manner as a judgment and so on, and then 2:

"Permission having been granted under section 66(1) as aforesaid, the claimant may later request the judgment be entered into."

Then 3:

"The defendant has the right pursuant to CPR 62.18(9)(a) within 14 days after service of the order to apply to set it aside."

Which we in fact did.

Then 4:

"Pursuant to the provisions of CPR 62.18(9)(b) the award must not be enforced until after the end of the

14-day period, or, if an application is made by the defendant within that period, to set aside this order ..."

And that application was set aside:

"... until after that application has been finally disposed of."

Now, I would like my Lady mentally to draw a line under the words, "finally disposed of", because that's important. And those words -- what the order does is track in terms the wording of CPR 62.18(9) which one finds at Part 2 of the White Book, 712, and effectively -- I mean, if it's easy for my Lady to look at it. But in fact the words of paragraph 4 of Mr Justice Bryan's order mirror the wording of CPR 18(9)(b):

"The award must not be in force until after the end of that period -..."

That's the 14 days:

"... or any application made by the defendant within that period has been finally disposed of."

Now, our application to set aside or stay the order of Mr Justice Bryan stands and falls on exactly the same grounds as our section 68 application, which will be heard in November, namely those grounds which are set out in the section 68 application.

If we're correct that there was a serious irregularity giving rise to substantial injustice such that the award should be set aside, we say the enforcement order -- the order of Mr Justice Bryan has got no independent existence if the award upon which it is based is set aside.

However, by -- it is Vale's argument that they should be permitted to enforce the award effectively from today even if in two and a half months' time, as a result of the hearing on 27/28 November, the award is set aside or remitted. That's their argument.

Now, one asks oneself if in fact, as a final order, because what this court would do today would inter partes make the order or confirm the order which Mr Justice Bryan made on an ex parte basis back in May -- what would the court then do, if one sees -- in November if we succeed on the section 68?

Because if the award has gone, because it's been set aside, then there will be nothing to enforce and that would then make a nonsense of the order which the court makes today.

On the other hand, if my Lady sets aside Mr Justice Bryan's order, that again would be a final order. If it turns out we lose in November, will, by some process of resurrection, the order be revived or

will there be another order? So we say that in fact the right way of dealing with this is to stay the order pending the hearing of the section 68 application, because in fact the application can't be finally disposed of until one knows what actually happened -- or will happen to the section 68 application, because --

MRS JUSTICE MOULDER: Mr Gruder, if that was the case that would be the position on every judgment which is sought to be appealed and it's not the case.

MR GRUDER: No, but this is not --

MRS JUSTICE MOULDER: So there's no conceptual difficulty. This is what happens -- I've no idea what the percentages are but there's certainly no automatic stay if a judgment is to be appealed; even if the court grants permission there is no automatic stay.

MR GRUDER: Well -- but this is not -- this is not an appeal, this is a challenge to the integrity of the award. I quite accept that if one has a judgment and there is an appeal, then of course unless there is some other order, a stay of execution or something of that kind, then of course the judgment stands, I accept that. The appeal is not an automatic stay in itself.

But in fact, CPR 69 and the terms of the order effectively says the order cannot be in force until, if one takes the wording of the order, the application has

been "finally disposed of". Can you -- and I ask rhetorically, how can you finally dispose of an order to set aside Mr Justice Bryan's order until you know whether the arbitration award upon which it's based is finally going to be held to be a valid one or not? It is provisionally valid, I accept it's provisionally valid, of course, but in fact the application to set aside the ex parte order, the without notice order, is completely hand in glove with the section 68 application. If one -- one at the moment has got an arbitration award which is prima facie valid -- I accept it's prima facie -- but it's subject to a section 68 application. You've got an application to set aside a without notice order of Mr Justice Bryan which is based upon the fact our case that the -- our case that the award shall be set aside under section 68.

Now, if you're finally going to confirm that order and supposing we succeed in November, it is difficult to see how you can then effectively say, well, it now appears that we were wrong to grant -- to confirm the order, the order of -- this is not -- what the other side are seeking is not some provisional life for the Bryan order, they're seeking a final order.

In my respectful submission, you can't do that until you know that the challenge has failed or succeeded. So

in my respectful submission the right way of dealing with it is to stay the order of Mr Justice Bryan pending the section 68, where that -- where the whole issue of the validity of the award, and in my respectful submission the validity of the without notice order under section 66, will be finally determined.

MRS JUSTICE MOULDER: I don't think that -- whilst I understand the argument you're advancing about it being provisionally valid on the wording of the section, I'm not aware of any authority that would support it and looking at Russell, which was included in the bundle, at 8/10 that doesn't appear to be the approach which Russell said was the result of the language.

MR GRUDER: Well, there is one authority which I would want put before my Lady, which is the judgment of Mr Justice Eder in Y v S at tab 28 of the authorities bundle.

MRS JUSTICE MOULDER: I'm sorry, tab 28?

MR GRUDER: Tab 28.

MRS JUSTICE MOULDER: Thank you.

MR GRUDER: If I can ask -- sorry -- if I can ask my Lady possibly to look at the facts in the headnote at page 703. (Pause).

MRS JUSTICE MOULDER: Yes.

MR GRUDER: And then -- well, if I can go to paragraph 23 on

page 709 and one sees Mr Justice Eder saying:

"It is important to understand that the application made by Mr MacLean under this head on behalf of S is that the court should now make an unrestricted final order granting leave to enforce the award in the same manner as a judgment or order of the court, ie before disposal of Y's pending section 67 challenge which, following a recent directions hearing by Mr Justice Flaux, is now fixed for a four-day hearing."

And that in a way -- well, effectively although it's section 67, it is what the other side are asking for today.

24:

"In essence Mr ..."

And then he sets out in paragraph 24 Mr Diwan's arguments, and then at paragraph 25 he says:

"In the course of the argument relating to this application there was much debate as to whether CPR 62.18 provides an exclusive code for the enforcement of arbitration awards. If an application is made for leave to enforce an award pursuant thereto, where the court is in effect inevitably bound to make an order as stipulated CPR 62.18, ie prohibiting enforcement pro tem where the court might be able to vary or suspend the terms of the order so as to require respondent to put up

security ..."

We will come to that a bit later, because that's the other side's fallback position.

If I can then go to paragraph 30 on 709:

"The second point also concerns the formulation of paragraph 2 of this suggested draft order. Following the structure of CPR 62.18(9) the prohibition against taking steps to enforce is normally linked to a potential future application to set aside the order for leave to enforce. Here I recognise an application under section 67 has already been issued and this explains the wording suggested by Mr Diwan. However, in my view, and subject to any further submission from counsel, appropriate wording should be as follows ..."

And he sets it out.

Then he then sets out 1, 2, 3 and says:

"No doubt the application to set aside may refer to the existing section 67 application and/or the same grounds, but it seems to me this wording is more appropriate because it follows the structure of 62.18."

And then one goes to -- the next question is security and then in 32 -- I ought to deal -- since I'm on this case I ought to deal with the security point, because that's, as I said, the other side's argument, that even if we're right, there should be security:

"In principle I see much force in this argument, however it's not clear to me how such an argument fits in with the overall scheme of CPR 62.18, including in particular 62.18(9) or how the approach of the court on the question of provision of security ... fits in with the approach of the court under section 77 ..."

He refers to Konkola:

"Further, contrary to ...(Reading to the words)... I was not persuaded to arrive at any decisions for Article 6."

And then he says:

"Sadly the time allowed for the present hearing (two hours including judgment) was insufficient to permit proper consideration of the argument. Unfortunate because it raises a point of some considerable practical importance. My tentative view is CPR 62.18(9) speaks for itself, ie in principle a successful party's prima facie entitled to an order nisi granting leave to enforce an arbitration order as prescribed by CPR 62.18(9). But if an application to set aside such an order is issued, then subject possibly to a counterstrike application, the award must not be enforced until such application is disposed of. There's nothing in CPR 62.18 that contemplates that such temporary prohibition against enforcement may be made

subject to an order of security."

So this is -- we're coming to it:

"As it seems to me it is also consistent with the decision of this court in IPCO at paragraph 20, where an enforcement order was held to be defective. Section 70(7) only applies to sections 67, 68 and 69 of the 1996 Act. It does not apply to any application for leave to enforce under section 66 of the 1996 Act. Consistent with section 70(7), it seems to me that any application for an order requiring provision of security of the amount in the dispute must be made in the context of a discrete application under sections 67, 68 and 69."

Then I think probably that's where I can leave it.

Now, in my respectful submission, and in particular that passage at the bottom of paragraph 30, where the judge says:

"No doubt the application to set aside may refer to the existing section 67 application and/or the same grounds -..."

He is contemplating, in my submission, that the matter is not -- the application cannot be finally disposed of until there is final disposal of the -- in that case section 67 application but in this case the section 68 application. And I would respectfully submit that that's the sensible matter because otherwise you

would have an order either an ex parte order set aside and then revived or an ex parte order confirmed finally and then two months later that order is then effectively subverted by a further order setting aside the arbitration award under section 68.

In fact Vale come close, at least to some extent, in accepting this, because if one looks at paragraph 43 of their application -- of their skeleton argument, they say this:

"Fourth, where a party has a pending challenge to the award the correct approach is not to set aside the enforcement order but to consider whether to grant a stay of enforcement pending the hearing of that challenge. And, if so, on what terms. This is the approach described in the leading works on arbitration and applied in Socadec."

Now, we accept that the right way of looking at it and the way to deal with this is to decide whether it should be stayed, but we part company on the submission that the court should order security or indeed the court has any power to order security because of what Mr Justice Eder said in Y v S.

What's more, his decision in Y v S is consistent with the decision of the Supreme Court. It's not on section 70(7). It's not on section 68. In IPCO

(Nigeria) v Nigerian National Petroleum Corp, which one finds at tab 33 of the authorities bundle.

Now, this is a very -- a case with a very long history and if one looks at the headnote at page 970, what in fact happened was there was an arbitration in Nigeria with an award of $152 million and the claimants sought to enforce the award through the English courts under Part 3 of the Arbitration Act:

"Parties agreed by consent order to adjourn the English enforcement proceedings under section 103(5) of the 1996 Act pending resolution of a challenge to the award brought by the defendant in the Nigerian courts. The defendant agreed to pay certain undisputed sums into court as security. The defendant subsequently became aware of evidence the claimant had secured the arbitration award by way of fraud and amended its pleading in Nigeria accordingly. The claimant unsuccessfully applied to set aside the consent agreement and force the arbitration award in England on the basis that delays to the Nigerian proceedings amounted to a change of circumstances. The Court of Appeal allowed the claimant to appeal, holding that the fraud allegation itself amounted to a change of circumstances which justified lifting the stay of English enforcement proceedings in order that rather

than await the outcome of Nigerian proceedings the issue whether fraud was an answer to enforcement raised an issue of public policy under section 103 should be decided in the English courts and further enforcement awards should be adjourned under section 103(5) on condition the defendant provides security of 100 million ..."

That's the important part of it for our purposes. And one sees the holding, if I can ask my Lady possibly to read the holding at the bottom of the headnote. (Pause).

And if then I can make one or two submissions and perhaps show my Lady perhaps one or two passages.

MRS JUSTICE MOULDER: Yes.

MR GRUDER: One sees what the Supreme Court is saying is section 103(5) of the Arbitration Act provides security might be ordered where there was an adjournment within its terms, but there was nothing in section 103(3) which provided that a court could make its decision under that provision conditional upon the provision of security.

And effectively the reason is, we would submit, analogous to Mr Justice Eder's reasoning that if there is an express power to order security, as there is under section 70(7), then the court can't then, when it's dealing with section 66 and dealing with -- if the court

decides to stay a challenge to a without notice section 66 judgment it can't then seek to order security as a condition of that stay.

And one sees -- well, one sees section 103 quoted in detail at paragraph 14 of the judgment and one -- the passage I relied upon is actually a very short one. It's in paragraph 24. What Lord Mance says is:

"In both these respects the Court of Appeal fell, in my opinion, into error. First, nothing in section 103(2) or 103(3) or in the underlying provisions of Article 5 of the New York Convention provides that an enforcing court may make the decision of an issue raised under either subsection conditional upon the provision of security in respect of the award. In this respect, there is a marked contrast with section 103(5), which specifically provides that security may be ordered where there is an adjournment within its terms."

And we say, yes, there is an express power under section 70(7) but one can't then seek to imply powers which the court might have when there are provisions in this -- in the Arbitration Act which provides for the possibility of security in appropiate circumstances where there's a challenge under section 68 or section 67. But there's nothing which makes an application to set aside or stay a without notice

judgment under section 66, subject to security. So in our respectful submission we submit that Mr Justice Eder was right and it's supported by IPCO (Nigeria).

Now, there are some other submissions my learned friend has made and so, for example, if I can go to paragraph 42.1 of his skeleton, one sees this. He says, third, he says:

"An award debtor cannot oppose enforcement on the basis that the award was tainted by a serious irregularity."

Now, the facts that those judgments are dealing with are totally different types of facts. They've got nothing to do with section 66 and the terms upon which the court -- whether the court should discharge or should stay a without notice section 66 order. What it is envisaging is somebody who is, for example, sued upon an award or there's an attempt to enforce an award and the party seeks to resist enforcement on the basis that the arbitrators acted unfairly. One sees this from section 422(1), where Lord Justice Scrutton says in the Scrimaglio case:

"... the decisions are settled but once you have the arbitrator properly appointed and the objection to the award is that being properly appointed he has conducted himself improperly in the arbitration the award can be

set aside on the grounds of misconduct. That cannot be set up as a defence to an action upon the award, the objection must be raised by a motion under the Arbitration Act to set aside or remit the award."

Now, what's that's envisaging is of course there is a section 66 procedure, but of course a party could, and perhaps at the time of Lord Justice Scrutton regularly might have done that, to -- can sue upon the award and say that the party is -- there is a cause of action for a failure to pay the sums awarded, a cause of action in debt. And what is envisaged is if that -- such an application -- if such an action is brought, the party seeks to resist the claim based upon the award by saying there was misconduct.

What the Court of Appeal is there saying is: I'm sorry, you can't do that. If you want to raise the issue of misconduct, or in our language serious irregularity, the objection must be raised upon a motion under the Arbitration Act to set aside or remit the award. Well, that's precisely what we have done and we say that that means, and I won't repeat myself, it means that the court should stay the section 66 in order for everything to be finally determined in November.

The other authorities really don't take the matter further than Scrimaglio itself. So we do, in our

skeleton, put forward alternative bases for our case here. We deal with public policy at paragraphs 52 and following, and the courts -- paragraph 54 and following, the court's inherent jurisdiction to suspend enforcement pending challenge to the award.

We say that the court has got no power, for the reasons I've said, to order security, but if the court did have power to order security, the court's power should be exercised consistently with its power under section 70(7), because, in our submission, it would be wholly anomalous for the court to award security under section 66 as the price of staying the order pending the hearing in November if the court would not order security under section 70(7), which gives the court express power to order security pending a section 68 challenge.

So unless I can assist you further on that, those are my submissions on that application.

MRS JUSTICE MOULDER: Thank you.

Submissions by MR FOXTON

MR FOXTON: My Lady, I'm going to follow the same order as Mr Gruder and deal with my reply submissions on our application first and then respond to Mr Gruder.

Now, in relation to section 70(7) there is an issue of timing: when must the prejudice occur? It cannot be

a requirement that it happens after the date of the hearing of the application to impose a condition. Otherwise the longer you were able to put off the hearing of the other side's application for a condition, a more of a free run you would get in terms of being able to move assets and so forth before any matters could be relied upon to support a condition.

I accept it runs from the date that the application under section 68 is issued and it runs of course not until the date of the hearing in November, but until the final disposition of the section 68 application. None of us know when that might be.

Now, in relation to the wholesale reliance upon the administrators, what, with respect to Mr Gruder, that does not adequately deal with is prejudice in the form of the inability to recover or trace assets using rights of the company from counterparties to whom they have been moved.

That is not wholly fanciful because we know that 500 million was immediately moved out to the Liechtenstein trust. We know that there have been other movements of assets prior to the administrators' appointment.

The administrators themselves do not control what is happening in any recipients of funds from BSGR and they

do not pretend to have any control over that. So nothing in relation to what the administrators can and cannot do answers that prejudice.

Mr Gruder says, well, you should fund the current administrators --

MRS JUSTICE MOULDER: Sorry, just on that, I seem to recall in Mr Cohen's witness statement he said that your clients had been asked to provide --

MR FOXTON: The very point I was coming to next, my Lady --

MRS JUSTICE MOULDER: -- details. All right.

MR FOXTON: -- if I may.

It is said by Mr Gruder, well you should fund these claims yourselves. But that is a request that we fund administrators who describe our complaints about the conduct of BSGR management as "unsubstantiated assertions" and do so notwithstanding the findings that have been made by this tribunal in this award, in circumstances where those administrators are acting on the basis of funding from the very people against whom those claims may well need to be brought.

We do say that the suggestion that in those circumstances we should fund the administrators, while they are still liaising with management and funded by the shareholder to investigate claims against Mr Steinmetz and others, is, with respect, unrealistic

to expect any creditor to do that.

The great benefit of being to enforce and liquidate is that there would be no ongoing link, as it were, between the potential objects of such recovery litigation and those managing BSGR, and that is a fundamental point of distinction.

The funding agreement in fact does not allow the administrators to resign. It has a provision, from recollection, that allows the funding entity to give three months' notice to terminate, but not the administrators themselves. For so long as the administration continues and they are the administrators, that agreement applies. So it is not as if one could say, well, we would like you to sever your links with the funding entity before we go into the merits of claims against the funding entity.

There is just a practical problem here that makes funding these administrators --

MRS JUSTICE MOULDER: Sorry, so you're saying that the administrators have put themselves in a position where they can't resign? That sounds a very extraordinary proposition.

MR FOXTON: I suppose if the court removed them as administrators or they went to the court to be removed, but the contract itself includes a unilateral provision

for termination. I should probably take your Ladyship to it in the ... (Pause).

It's in volume 2, tab 10, page 37 to 38. I think they would have to go to court and have themselves removed but there isn't a provision for service of cancellation by the administrators under this, only by the parent.

(Pause).

MRS JUSTICE MOULDER: I obviously don't have the opportunity to read this whole thing, but flicking through it clause 15 refers to administrator resigning his office by giving notice of resignation so I'm not really sure --

MR FOXTON: I accept if they cease to be administrator at all then this won't apply to them.

MRS JUSTICE MOULDER: Sorry, I've missed the point.

MR FOXTON: So long as they are administrator, they are administrator on the terms of this funding agreement with the parent. It's not a contract of servitude which requires them to carry on with that role, and it's not a contract in which they can both carry on with the role of being administrator and not be subject to the terms of this agreement.

MRS JUSTICE MOULDER: What's your objection therefore then to the funding agreement; just that it's connected with

the former management?

MR FOXTON: In the context of the specific point under discussion, namely that we should be funding these administrators to pursue claims or investigate claims against parent companies and those behind parents companies, it is the practical, deeply unattractive nature of having that sort of a discussion with administrators at the same time as they are tied by the funding agreement to the very entities against whom the claims would need to be investigated and brought.

MRS JUSTICE MOULDER: All right.

MR FOXTON: Now, my Lady, in relation to the ICSID settlement, whatever merits the claims may or may not have had, somehow Niron, which appears to be a vehicle with which Mr Steinmetz has some connection, is somehow extracting value from the proposed settlement of it and on the ground, at least, Niron appears to be carrying on on the basis it will indeed be the person operating this concession.

The effect of that arrangement is that value from the ICSID claim is going, not to the creditors but to Niron and possibly to Mr Steinmetz. And, my Lady, we do say that against the background of the findings made by the tribunal, that is a deeply unattractive state of affairs.

In addition, the ICSID arbitration seeks restoration of the concession. That's part of the relief sought. It's probably worth going to that in volume 1, tab 7, at page 18. (Pause).

Now, this is the administrators' report of 7 March 2019 and at 4.1 it summarises the claim. My Lady will see from the last sentence of the first paragraph of 4.1:

"The company's claim seeks the restoration of those rights -..."

And that is a form of relief in which changing events on the ground --

MR GRUDER: If my learned friend could actually read the next three words.

MR FOXTON: "... together with damages."

I hope Mr Gruder knows me well enough to know that I would not deliberately fail to read three words.

MR GRUDER: Absolutely not, but you might inadvertently do so.

MR FOXTON: Well, there we are.

So it is seeking that together with damages. I don't know how that remotely helps Mr Gruder beyond giving him an opportunity to interrupt because part of the relief that is being sought is relief that a changing position on the ground clearly has

implications for them.

My Lady, it's also said where does the figure come from? Where is your evidence of the quantification of prejudice? My Lady knows that the figure of 500 million is the amount of cash fraudulently obtained at the start that was immediately shot up to the Liechtenstein foundation. It is, with respect, an entirely legitimate inference that when someone fraudulently obtains £500 million and then shoots it up to another company, or indeed a foundation, straightaway, that that might be done in order to prevent recovery in the event that the fraud comes to light.

It is very difficult to try to quantify in mathematical terms what -- a risk of prejudice and what might or might not be recoverable. We've sought to go for a figure that has objective rational connection with the findings in the award, and is 25% of the amount outstanding. If the court takes the view that that figure is too high and in the light of the uncertainties to the assets a smaller figure would be appropriate, so be it. But in freezing injunctions it's not a case in which it can be said, well, we can show you the maximum value of assets capable of being affected by prejudice, limit it to that, because we do not have disclosure of the full extent of the value of BSGR's assets and, more

to the point, one is dealing here with prejudice in the inability to recover assets from third parties to whom they have been wrongfully passed by BSGR, not just against BSGR itself.

There was a suggestion by Mr Gruder we had brought this application with the intention of stifling but I think he accepts that there's no evidence that the application would, if granted, stifle the claim so I think that point falls away.

Then in relation to the costs order of Mr Justice Popplewell, of course the court has inherent jurisdiction to make that a condition of pursuing an application.

One of the reasons for summary assessment of costs is to bring home to parties the consequences of running bad points. That is a fortiori the case when the costs are ordered on an indemnity basis to mark the court's disapproval of the way in which the case has been run and those policies would be seriously undermined if a party could simply say, "Well, I'm not paying and I'm carrying on litigating the same matter at a second stage in the court regardless".

MRS JUSTICE MOULDER: You'll have to forgive me, but I'm not sure I understand how your condition of payment of those costs is sitting with the two applications. So on the

one hand we have the application for security in the amount of 500 -- I hear what you say about the amount but leave it at that. On the other hand, and no doubt you're coming to it, we have the application for a stay or set aside. So I'm not quite sure where the Popplewell costs are fitting into those applications.

MR FOXTON: My Lady, it's not a section 70(7) or (6) and the reason for that is that Mr Gruder is right to say that on their own terms they deal either with in the case of section 70(7) amounts awarded by the tribunal -- and plainly the order of Mr Justice Popplewell is not an amount awarded by the tribunal -- or with security for costs of the set aside -- the section 68 application and plainly those costs are not costs of the section 68 application.

So they are not capable of falling within either of those two heads, but the court is itself able to impose as a condition of bringing any claim a requirement that prior costs orders in the same matter have been paid. So it rests upon an independent juridical basis but we would submit a well-established one and that it is entirely appropriate to invoke in the circumstances of this case.

MRS JUSTICE MOULDER: The problem it seems to me is that raised by Mr Cohen in his evidence, where he says that

is a debt which was outstanding at the point of administration and were the court to order it, there must be an argument that you are thereby getting priority for that debt.

MR FOXTON: There are, I think, three answers to that difficulty. The first is that the administration has not been recognised, despite a threatened application for recognition, such that it has no status as a reason not to pay debts in this jurisdiction.

Secondly, that the payment of the amount could come not simply from BSGR but from those who stand to benefit standing behind BSGR in much the same way as any order for provision of security might so come.

Thirdly, it is open to the court, if the court is concerned about this, to make the condition one of payment of the amount into escrow or into court on the same terms as any security, rather than outright payment to my clients.

MRS JUSTICE MOULDER: Sorry, what would that achieve?

MR FOXTON: I'm sorry, my Lady.

MRS JUSTICE MOULDER: What would payment into court achieve?

MR FOXTON: Because the court then has the ability to control the subsequent disposition of the payment if an insolvency event occurs such that it would be argued that paying it out to my clients would involve some form

of unfair advantage over other creditors. (Pause).

My Lady, security for costs very briefly. Mr Gruder focused on counsel's fees. In fact, the counsel's fees are significantly higher today on his clients' part. As we're going there, Mr Gruder I think is on a £100,000 brief compared with my £65,000. Mr Quirk on £50,000.

With respect to Mr Gruder, there is a great deal more work to do for the section 68 itself, not least there are 3,400 pages of exhibits to his clients' challenge application alone and we have not begun to wade through all the footnotes in para 11 of Mr Gruder's skeleton and compare the evidence said to have been given in the ICSID arbitration with the evidence in the LCIA arbitration and matters of that nature. So there is a great deal more to be done. (Pause).

Now, my Lady, that brings me to the set aside application and I do have to say that the submissions made to you by Mr Gruder on this point are completely heterodox as to -- what is implicit in there is that there is no enforcement of awards while a section 68 challenge is pending. That is simply not and has never been the law. It's not what Mr Justice Eder says either.

Clearly, if the section 68 application succeeds while enforcement is under way, it is open to the court

and the court would inevitably -- and it would not even be opposed -- set aside any enforcement order that had been made or any orders following on from that. Just as success before the Court of Appeal leads to the setting aside of a judgment and any following consequential enforcement orders made on the basis of that judgment. That is because the setting aside of the award is a change of circumstance that allows the court to revisit the issue as to the status of enforcement, and that never causes any difficulties at all.

But the point here is the mere possibility of a challenge succeeding in the future does not provide a defence to enforcement in the meantime when that challenge is based on section 68 because of the presumptive validity of the arbitration award.

My Lady, there is a fundamental distinction, and an important one, between challenges based on lack of jurisdiction under section 67 and challenges based upon serious irregularity under section 68. Because an award where jurisdiction is disputed has no presumptive validity, in contrast to an award where it's accepted there is jurisdiction but the challenge is on the basis of serious irregularity.

Now, if authority is required for that proposition, we have it, amongst other places, in

Mr Justice Tomlinson's judgment in Peterson Farms at tab 16 of the authorities bundle. My Lady, it's at paragraph 26 where the judge explains the conceptual difference between challenges under section 67 and section 68, your Ladyship I'm sure is familiar with the passage.

That conceptual difference is also reflected in the wording of section 66 itself, because if one goes to that, and it's in, I think amongst other places, bundle 3, it expressly contemplates lack of jurisdiction or a challenge to lack of jurisdiction as a reason to set aside enforcement. That's what section 66(3) says:

"Leave to enforce an award will not be given where or to the extent that the person against whom it is sought to be enforced shows the tribunal lacked substantive jurisdiction to make the award."

There is no similar language in section 66 about challenges under section 68 or procedural irregularity.

One reason that that is important is when one comes to Mr Justice Eder's decision in Y v S, because that, of course, was a case in which there was a jurisdictional challenge to the award.

Now, I don't know whether my Lady sufficiently recollects the matter from -- I know you were taken to the case a matter of moments ago, but it was

a section 67 case. Now, a party with a section 67 is able, under section 66(3), to say "I am challenging the jurisdiction of the tribunal over me", and therefore there is a complete overlap between a legitimate defence to the enforcement order and the challenge to the court.

There is no such overlap when the complaint brought by the party is not lack of jurisdiction but serious irregularity.

So, my Lady, the argument that this can all be set aside now because there is a future section 68 is, with respect, hopeless.

Mr Gruder did not develop beyond his skeleton argument on the issue about whether this might constitute a public policy defence. My Lady will know that section 68 itself includes public policy as one head of serious irregularity and the court may feel that in a section 68 application, not noticeable for the number of the narrowing on the points taken, that head of challenge is not brought to the award itself.

So we are plainly nowhere near public policy. The attempt to elevate every serious irregularity to public policy would mean a section 68 would automatically prevent any attempt to registration and enforce an award under section 66. That, with respect, is plainly not the law.

Now, of course if judgment is entered under section 66 the award stands in exactly the same position as a domestic judgment of this court, with the ability of the court to stay execution on terms, but subject to very well-known principles. It is not automatic. One doesn't lightly deprive the judgment creditor of the fruits of the judgment. One looks at the balance of prejudice. There's no evidence of prejudice to Mr Gruder's clients here. One now certainly is able to take advantage of looking at the prospective merits of the appeal.

And our suggestion that stays of execution of judgments entered under section 66 are decided on conventional principles by reference to CPR 83.74 is, as I think my Lady has spotted, supported both by Russell on Arbitration and by Merkin, both of whom make it clear that once the judgment is entered it is that standard CPR rule that determines the enforcement regime. It is Russell para 8-008, tab 47 of the bundle, and Merkin, para 19-16 at tab 48, and we do submit that that is well established principle.

There is no reason at all why these judgments entered under section 66 should somehow stand differently to judgments of the court delivered following proceedings in the court. With respect to

Mr Justice Eder, who heard no argument on the point, the suggestion that section 70(7) guides the exercise of the stay on enforcement is wrong, because there is a fundamental difference between imposing a condition on the right of a party to argue a point at all and imposing a condition on the indulgence to that party of staying the execution that normally follows inevitably from the entering of a judgment against them, even if under appeal.

My Lady, that fundamental difference is, of course, reflected in the very different approach taken under the CPR between stays of execution of a judgment and a request to the Court of Appeal to impose a condition on the right to bring an appeal at all. And because imposing conditions can raise stifling arguments, imposing a requirement before execution will be stayed does not raise a stifling argument, it simply raises an argument of where is the balance of convenience and prejudice against the presumption that the fruits of judgments are not lightly to be denied.

So my Lady, for those reasons we say, first of all, the attempt to say that the section 68 provides a reason not to allow the application to enter the award as a judgment to stand is completely misconceived and wrong. The reliance on Y v S is completely wrong

because that is a case where there was a challenge to jurisdiction, which is a defence to an attempt to enforce under section 66(3).

The relevant procedural framework for a stay of execution is the standard CPR one, as the authorities make clear, and the attempt to analogise between that and section 70(7) is simply wrong.

My Lady, similarly the reference to IPCO is, with respect, not on point. That was of course a case in which fraud had been raised, which would be a public policy defence to any attempt to enforce, and is expressly preserved, I think, by section 81 of the Act. In any event it came in a context in which the relevant statute expressly gave a power to order security when a party was relying upon a challenge in the curial court but no power to order security when a party was exercising its independent right to resist enforcement in the enforcement court.

Here, by contrast, section 66(3) provides no basis upon which section 68 challenges prevent enforcement and one simply falls back on the standard CPR 83.7 wording. And, my Lady, we do say that this is a case in which, applying that well-known test, there is no way in which BSGR come even close to getting the order that would stay execution of a judgment. It has adduced no

evidence at all of any prejudice that might flow from such an order being made. The merits of its challenge are, with respect, exceedingly poor and in those circumstances the starting presumption that it is a rare thing to deprive a successful party of the benefits of its judgment debt should also be the final point of the court's decision-making.

So, my Lady, I've dealt with that relatively briefly but your Ladyship seemed to be alive to all the various points and I hope that that wasn't too summary a set of submissions.

MRS JUSTICE MOULDER: Thank you.

Submissions by MR GRUDER

MR GRUDER: My Lady, I've got obviously the right to reply on the enforcement part. I just would like to have an indulgence just to give my Lady a reference which I forgot to give my Lady on the security for the claim part, which is bundle 2, tab 10, page 82, which is the -- which I forgot to show my Lady when I was taking my Lady through the draft agreement at page 82. I forgot to show my Lady the signature page of that memorandum of agreement or provisional agreement, whatever one calls it.

One sees the signature page. The first signature is by one of the joint administrators acting as agent

without personal liability, without giving any representation:

"... subject to finalisation of a formal contract with the entry into and execution of any such formal contract being first sanctioned by an order of the Royal Court of Guernsey and signed in accordance with and subject to their duty as administrator on the basis that this document shall be governed by the laws of the Island of Guernsey."

Then one of the directors of BSGR signs, one of the directors signing:

"... subject to the finalisation of the formal contract and signing on the basis that this document shall be governed by the laws of the Island of Guernsey."

And then there is another director. The same basis. I forgot to show my Lady to that.

Now, if I can come to my learned friend's argument and --

MRS JUSTICE MOULDER: Mr Gruder, I'm not going to cut you short but we are going to need a transcriber break, so I don't know how long you're going to be. Is now a convenient moment?

MR GRUDER: It is a convenient moment. Thank you my Lady.

MRS JUSTICE MOULDER: Let's take the transcriber break now,

as I said I didn't want to cut you off shortly.

Thank you.

(3.12 pm)

(A short break)

(3.22 pm)

MR GRUDER: My Lady, can I first of all deal, perhaps in reverse order, with the arguments my learned friend made based on CPR Order 83 to say that I am seeking a stay of execution of a judgment and the court's normal powers and the discretionary factors the court takes into account apply.

My Lady, I mean, I'm obviously telling my Lady what my Lady already knows, CPR 83.7 deals -- starts:

"At the time that a judgment or order for payment of money is made or granted or any time that a debtor or other party liable to execution of a writ of control or warrant may apply to the court for a stay of execution."

That's page 2396 of the White Book.

There is a fundamental flaw in my learned friend's argument. There is no judgment. There is no judgment in this case. We're not seeking a stay of execution, and I can demonstrate this to my Lady very, very easily. If my Lady will come to volume 5, tab 17, one finds the remedy -- the application notice for -- which Vale issued which led up to the Bryan judgment. Paragraph 9:

"The court seeks permission to enforce the award in the same manner as a judgment or order of the High Court to the same effect pursuant to section 66 excluding the post-interest award -..."

And the rest:

"It reserves the right later in its discretion to seek to enter judgment in terms of the award pursuant to section 66(2) of the Arbitration Act."

They have not done that. There is no judgment.

And if one goes to the Bryan order, which one finds at tab 19, one sees that 1 gives them permission to enforce the award in the same manner as a judgment. Paragraph 2:

"Permission having been granted under section 66(2) as aforesaid, the claimant may later request that judgment be entered in terms of the award under section 66(2) of the Arbitration Act."

So there is no judgment. They have liberty to enforce the award in the same manner as a judgment, but there is no judgment entered against us and therefore all my learned friend's arguments based on CPR 83.7 are misplaced.

Secondly, my Lady, if then CPR 83.7 has no application, and all those authorities about it, which in my submission is correct, then if you are going to

stay this order, then, in my respectful submission, the order, if it's stayed, it prevents them from obtaining the fruits of their award.

And an application under section 68 also potentially challenges their right under the award. If section 70(7) -- if there is a power for the court to order security -- in my respectful submission there is no power because Mr Justice Eder was right -- any power has to be exercised consistently with the power under section 70(7), and you've obviously got my submissions on that.

If I can then come to my learned friend's argument that what I'm saying is heterodox, what my learned friend is seeking do here -- now, in a normal situation our section 66 application would actually come on at the same time as the section 68 application. I mean, it makes sense, because they are two sides of the same coin.

Now, there is a timing difference here. It was managed by Mr Justice Teare in a way that our application to set aside the order should -- the Bryan order -- should come on at the same time as the security for costs and the security for the award application and not at the same time as the section 68.

So what my learned friend is trying to do is to take

advantage of that -- it was a management decision, but to take advantage of that management decision in order to effectively have the benefit of two and a half months which, in my respectful submission, he shouldn't have.

And in my submission -- my learned friend says what I say is heterodox. In my submission, it's not heterodox for this reason: that one can -- if my learned friend is right, it means that in every case where there is a timing difference, that there is effectively -- the application to set aside the ex parte order comes on before the section 68 -- let's keep section 67 to one side, I accept there is potentially a difference there -- a section 68 application, a party can say well, there are these allegations and, you know, it's all going to be determined in a few months' time but the award is presumptively valid, you know, and therefore make the order final. And in my submission my submissions are not heterodox. They are actually bound up in the words "finally determined" and the fact that in -- with all due respect to Mr Justice Teare, in a properly managed situation the -- our application under section 66 would come on at the same time as our application under section 68. And that, in my submission, is the long and short of it.

My learned friend then sort of struggled, with all

due respect, to try and get the court to order security for us to pay the Popplewell costs order as somehow security or a condition and he said it's -- there are, I think, very established foundations and jurisprudence to justify that. But I note, with all due respect, that he didn't produce one rule of court, one statute, one authority to substantiate the fact that the court can bring in a liability to pay a costs order on a totally different application, albeit an arbitration application, as somehow a condition for granting a stay of a section 66 order.

So unless I can assist you further, those are my submissions. (Pause).

Amendment. Yes, there is one further application, which is our application to amend the application, the arbitration application, which one finds at bundle 5, at tab 20 -- well, effectively there are a number of tabs which precede tab 28, but it's really, I think, tab 28 which shows the amendments.

And what the amendments show is that a number of, as one can see in red, challenges which were made have been dropped as independent challenges, but they are -- remain as the context which the court should take into account.

So if one looks at page 2 of that section, one sees

instead of there being a pattern of conduct, it just says "conduct" and then "apparent bias", and then there's a deletion. I think it's fair to say that these are substantially rowing back rather than adding things, although words are put in to try and connect it.

So if one sees at paragraph 7, it says:

"BSGR relies specifically on the tribunal's refusal to admit the ICSID hearing transcript and post-hearing brief on to the record."

And that is the meat of the application.

Then 7(a):

"The context, which is of particular importance to that decision, which is developed below is ..."

Then the matters on page 4, which were independent grounds under section 68 now become context, one, two and three.

Then one -- pages 4 onwards deal with the ICSID transcript point, which is the main point, and that goes on, my Lady, for a number of pages, as one sees.

One then really has to go on, there are no changes, until one gets to 15, page 15, and then those matters under 2, the refusal to reschedule the final hearing and not believing what Mr Wolfson said about his availability and his diary, and 3, on page 17, failure to reconsider the earlier decisions, and 4 refusal, on

page 18, to reproduce the original appointment procedure, become context rather than independent, context in which the court should consider the failure to allow us to put in the transcript, the ICSID transcript, against which that should be dealt with.

On page 20, you see the failure to deal with the frustration damages issue, which I erroneously said had been dropped but has not been dropped.

So that's what we're doing. We drop three independent grounds under section 68 but effectively say, well, you can't just approach the ICSID -- I mean, there is obviously a long history of this arbitration and, indeed, as you see from the way the other side have put their case today, they also rely upon history in trying to say that there's guerrilla tactics. Well, we say you can't just approach the question of the ICSID transcript as if it was in a vacuum. You have to look at what went on round about, either before -- effectively it's before then because the failure to allow them in came out at the time of the award, but in the immediate run-up to the application and so on.

So those are my submissions, and we deal with it very briefly on page 23 of our skeleton argument, paragraphs 55 to 58.

Submissions by MR FOXTON

MR FOXTON: My lady, like Mr Gruder, I have to crave indulgence for one reference I should have given your Ladyship before, Mr Justice Teare's order, bundle 5, tab 5, page 4, when he made clear:

"... the reason for the set aside application being heard today was there is a real issue as to whether the existence of a section 68 challenge is sufficient ground for setting aside an enforcement order."

So not quite the pure case management decision, something rather more --

MRS JUSTICE MOULDER: I'm sorry, I missed the reference. Could you give me the reference again, please?

MR FOXTON: Certainly, my Lady, it is bundle 5, at tab 25, page 4.

MRS JUSTICE MOULDER: Thank you.

MR FOXTON: My Lady, in relation to the amendment application, whilst we are always delighted when bad points are dropped, even sometimes when they are only dropped temporarily, the idea that it's appropriate for these to remain in the arbitration claim form in circumstances in which they are not alleged to represent legitimate section 68 complaints, we say that there is no merit in that at all. This is an attempt to try and keep these grievances alive but without having the

courage to strike and make the points in relation to them. Their presence on the claim form is open to misunderstanding, potentially, in enforcement jurisdictions as to the scope of the challenge. And pleading context of any kind but, a fortiori, three types of context that clearly are implicit criticisms of the arbitrators in a claim form, we submit, is wholly inappropriate.

So the answer is that if they are being abandoned, then they should be deleted and the costs of and occasioned by them should be ordered to be paid; and, in any event, abandonment should be on terms that it is not open to BSGR to try and resurrect them in some enforcement jurisdiction at some future point in time.

My Lady, the other provision that causes us concern, I think this is a point that causes Mr Hooker's clients concern as well, is the amendment at tab 28, paragraph 41 on page 19, and in particular the last sentence. If the only explanation of a decision is the tribunal is biased, that amounts to an allegation of actual bias. If, on the other hand, it's said the tribunal are not biased but they may have appeared to have been biased, then it cannot be said their refusal to admit the material is inexplicable on any other basis than bias.

Now, I know Mr Gruder would not be advancing an allegation of actual bias here, but, once again, it is important for other contexts in which this claim form might fall to be read for there to be no misunderstanding. So, in any event, we do invite your Ladyship not to allow that last sentence.

MRS JUSTICE MOULDER: You're going to have to help me, because I'm not sure I understand the point about "open to misunderstanding in other jurisdictions".

MR FOXTON: When it comes to attempts to enforce this award or, indeed, ongoing attempts to enforce it in the US, English materials have been deployed as grounds of challenge, and allegations that appear in their content to be criticisms are capable of being misunderstood as live challenges -- query, live challenges not disposed of -- because the attempt to relabel them in this context may be lost in translation or lost elsewhere.

MRS JUSTICE MOULDER: But I don't understand what real effect that's having. I mean, this is a pending action, it's going to be pending for a another couple of months, so I don't really understand what it is, therefore, that causes you a problem. Why would the US courts be interested in the nuances of the language in the allegations.

MR FOXTON: All one can say at the moment, my Lady, I don't

know what other enforcement activities may be contemplated, but at the moment these grounds of challenge here are being relied upon as reasons to resist recognition under the New York Convention in the US and, presumably, elsewhere.

So, my Lady, it is appropriate that a claim form for section 68 relief should only set out the grounds of section 68 challenge, and if grounds are brought and abandoned, the right thing to do is to strike them through and not allow them some form of half-life thereafter.

Perhaps that shorter point may be the real nub of this.

MRS JUSTICE MOULDER: You see, what I'm reluctant to do is to get into the merits of this. It seems to me that, leaving aside whether or not there's any difference for arbitrations, I would not normally be attempting to draft somebody's particulars of claim or defence. I would say, "Sort it out at the hearing on the merits and argue it at the time". So I'm not really sure that I've understood -- I understand why you don't like it, but context can be relevant to disputes and so I'm struggling to understand what it is that means that this court should be trying to draft the dispute that you're going to have in a couple of months' time.

MR FOXTON: Well, my Lady, Mr Gruder applies for permission to amend, and the standard exercise on any permission to amend is to look at the purpose and nature of the amendments.

MRS JUSTICE MOULDER: Yes, and one would strike it out if it disclosed no reasonable cause of action. I mean, there are various grounds on which one might refuse an application, but one doesn't normally get into the niceties of, "Well, I entered into an oral contract and this is the background context", for example.

MR FOXTON: But we're miles away from that, my Lady, because these undoubtedly, when they are brought forward, are brought forward as challenges to the conduct of the arbitrator.

Now, all that is being changed here is the label. They remain in their substantive content criticisms of the arbitrator, and that's simply not appropriate. If the points cannot properly be advanced, they should be removed.

In terms of providing context to the court, it remains open to Mr Gruder to make such submissions as he wants to make on the full range of evidence, but why single out these three as somehow special context to go in the pleading? The answer is they haven't been. They are simply there because they were wrongly pursued as

challenges in the first place, and that having finally been recognised, the appropriate course is for them to come out.

MR GRUDER: My Lady, can I first just come to paragraph 40 --

MRS JUSTICE MOULDER: Sorry, Mr Gruder --

MR GRUDER: Oh sorry, sorry.

Submission by MR HOOKER

MR HOOKER: My Lady, on behalf of the co-arbitrators, as I will call them, that's how they were described as by Mr Justice Popplewell in the previous section 24, we generally take the same position you've just outlined, which is that we're comparatively relaxed for BSGR to advance the claim in the terms that it wants to advance, and although we have a lot of criticisms about how the claim is now articulated, we're happy to address those at the hearing in November and take the claim as it's put.

I do think that some special considerations arise in the relation to paragraph 41.

MRS JUSTICE MOULDER: Yes, I do understand -- yes, my previous discussion was not focused on paragraph 41, which I agree is a separate point.

MR HOOKER: I mean, if it's helpful, I think the context of the arbitrators as defendants to this action is relevant

context to the submission I'm about to make. It's comparatively unusual -- the circumstances are comparatively unusual, in that the arbitrators are defendant to an application that's pursued under section 68 and section 24, and to date the arbitrators have taken the position that they wish to assist the court but they have not served evidence in the proceedings. And by agreement of the parties, that was sequenced in such a way that the arbitrators had the opportunity to see the evidence that was introduced by the parties and to make a reasoned decision as to whether or not evidence from the members of the arbitral tribunal would assist the court. The decision was reached and explained in correspondence that they saw no need to do so.

That's quite a coherent position in the context of an allegation of apparent bias, because, essentially, the record speaks for itself. So in respect of this issue specifically, well, Mr Foxton took you this morning to the parts of the arbitral award which set out, over the course of two or more pages, the basis, as explained by the tribunal, for the decision not to allow records from the ICSID hearing to be admitted. That is the explanation. The inexplicable explanation is set out on the face of the award.

Now, in the context of an allegation of apparent bias, that, essentially, is all anybody needs to have to refer to: look at the record. Does the record make out the allegation made that a reasonable observer would conclude bias?

Now, it may well be that the line that has got us animated isn't intended to change the nature of the allegation, but I do say it gives rise to potential prejudice two months from the trial, because if it's maintained and maintained in the form that isn't further clarified, then that decision that was reached by the co-arbitrators will necessarily have to be revisited, and they'll need to assess whether there is a different form of allegation that's been advanced. It may well be that this can be resolved very quickly and by agreement, and we're very happy to consider any revised form of drafting of this.

As I say, as to the remainder of the changes, although we would prefer the retreat to be complete, we are generally relaxed for the claim to be advanced.

MRS JUSTICE MOULDER: Thank you.

MR GRUDER: Well, if I can come to paragraph 41, I think if one reads paragraph 41, before one gets to the last sentence, it is quite clear that this is not an allegation of actual bias, this is an allegation of

apparent bias, ie a fair-minded and informed observer would conclude there was a real possibility the tribunal was biased. That is a classic test, one has it in Halliburton, for apparent bias The last sentence, which is in red, is not intended to convert that into an allegation of actual bias.

Now, I think probably the best way of dealing with this is for us to look at that last sentence to make it -- if there is any danger of misapprehension that this is an allegation of actual bias, then I think we possibly should look at that, because I don't believe -- when one looks at the heading just above paragraph 41, it says, "Conclusion on apparent bias."

So I think the draftsman intended to say:

"The tribunal refusal to admit the ICSID material is inexplicable on any other basis other than there was a real possibility the tribunal was biased."

That's the intended meaning, but I think it's right for us to -- if this is open to some kind of misconstruction, I think the best thing is for us to look at that sentence, rather than to -- because, as I read it, and as I read that paragraph and indeed as I read the heading above that, this is an allegation of apparent, not actual bias.

So that's what I say about that.

As for the rest of this, we say that we're entitled to look at things in context and if we set out here the context that we wish the section 68 to be approached in the light of, in my submission, that's not objectionable.

I mean, in an arbitration which -- you've only had, I think, a sort of soupçon of some idea of what went on, one can't deal with these matters in a hermetically sealed jar, and, in my submission, there's nothing objectionable in the way we've sought to draft this. (Pause).

MRS JUSTICE MOULDER: Does that cover the full gamut of applications?

MR GRUDER: I think it does.

MR FOXTON: It does, my Lady.

MR GRUDER: It does my Lady, yes.

MRS JUSTICE MOULDER: All right. I propose to reserve judgment. I'm conscious of the time constraints, but nevertheless I think I'm not about to embark on an extempore judgment at 3.50 pm, given the range of applications.

I think I would only make one observation about that last discussion. I am concerned, in particular, about that last sentence. I am minded to give you 48 hours to see if you can agree a form of words that you want. If

you can't agree, or if you decide, having reflected upon it, that you don't need the words, perhaps between you you can let me know.

MR GRUDER: Yes.

MRS JUSTICE MOULDER: Depending where you come out, I will then rule as necessary.

MR GRUDER: So be it, my Lady, yes. I am very grateful.

MRS JUSTICE MOULDER: Unless there's any objection to that course of action?

MR FOXTON: No, that sounds very sensible. I always hope Mr Gruder and I will be able to agree something, my Lady.

MRS JUSTICE MOULDER: Right.

MR HOOKER: Yes.

MRS JUSTICE MOULDER: All right. Well, I am grateful to counsel for their submissions. As I say, I do understand the time constraints, but, equally, I need an opportunity to reflect.

Thank you very much.

(3.52 pm)

(The court adjourned)

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